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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES T. BARRON,
Appellant,

vs.

CLAIRE J. ALEXANDER,
Appellee.

No. 2171.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1

AMENDED AND SUPPLEMENTAL BRIEF OF APPELLANT

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Amended and Supplemental Brief of Appellant

STATEMENT OF CASE.

This is an appeal prosecuted by the above named appellant and plaintiff, James T. Barron, from an order made by the trial court herein, on the second day of July, 1912, overruling appellant's motion for a new trial and a decree entered herein on the same date, dismissing appellant's complaint herein (P. R. pp. 52-54).

We believe the following to be a full, true and complete statement of the case, to-wit:

That on October 31st, 1908, one V. A. Robertson entered upon, and had surveyed, a portion of United States government land, unoccupied and unappropriated, and located, under the Soldiers' Additional Homestead Laws applicable to Alaska and pertaining to the acquisition of title to government land in said District of Alaska, that certain piece or parcel of land known as U. S. Non-Mineral Survey No. 804, lying and being on the south shore of Chatham Strait, a navigable arm of the North Pacific Ocean about five miles north of what is known as Hawk Inlet, in said district, which said U. S. Non-Mineral Survey No. 804 contained a water frontage on Chatham Strait of about 800 feet (P. R. p. 152).

On the 16th day of June, 1909, the official plat and field notes of said land and survey were approved by the surveyor general of the District of Alaska, and said plat and field notes, so approved, were, as in such cases made and provided, forwarded by the surveyor general to the local U. S. land office at Juneau, Alaska.

On the first day of March, 1911, for a valuable consideration, said Robertson conveyed, by a good and sufficient deed in writing, the above described tract or parcel of land, to James T. Barron, the ap-

pellant herein. On August 25th, 1911, Barron made application to the local land office at Juneau, Alaska, for a patent to the lands embraced in said survey (P. R. p. 93). Said application for a patent was prosecuted with diligence, and all the necessary steps taken looking towards the obtaining of a final receiver's certificate and all proofs submitted pertaining thereto, before the trial of this cause (P. R. pp. 101, 102), and the court found that, at the time of the trial of said cause, the said Barron was the owner and entitled to the possession of all of the tract of land embraced in said U. S. Non-Mineral Survey 804 (P. R. p. 49).

At the time of the purchase of said tract of land, by said Barron from said Robertson, the said Barron was, and had been for a long time prior thereto, largely interested in a corporation known as the Thlinket Packing Company, owning and operating a large salmon cannery at Funter Bay, Alaska, a distance of about four miles from the land embraced in said U. S. Survey No. 804; said salmon cannery was a large one and had the capacity of about 3,000 cases of salmon per day; Chatham Straits, the arm of the Pacific Ocean upon which the land in said Survey 804 borders or abuts, contains

navigable waters for all sizes of vessels, and in all parts of said straits the ocean tides regularly ebb and flow, and the waters of said straits abound in fish, and especially salmon, and particularly in that part of the waters of said straits immediately in front of and upon which said land and said survey abuts, making said piece of ground specially valuable as a fishing site, when the way to it, over the waters of said Chatham Straits, is unobstructed, and ingress and egress to and from said land to the deep water of said straits is unobstructed in any manner; on account of the winds and tides and the elements, the said tract of land is particularly and favorably located upon a small harbor, affording good anchorage for vessels and protection from the severe north and northwest winds which blow at certain seasons of the year in that locality. The particular location of said piece of ground, and the small harbor in front thereof, and the cannery site of the Thlinket Packing Company, in which said Barron is heavily interested, is indicated on the plat and map found at page 187, vol. 1 of the record. Also see Barron's testimony, page 189, in connection therewith.

Prior to the year 1910, the Alaska Packers' Association, a corporation engaged in the salmon

packing in Alaska, had used the waters in front of the tract of land in said Survey 804, for the purpose of running and operating a fish trap, and said Barron, by reason of operating the cannery of the Thlinket Packing Company, had become acquainted with this fish trap location, and the value of the harbor in front of said survey for the anchoring of vessels, and accordingly, in the year 1910, leased from the Alaska Packers' Association this fish trap site, afterwards purchased same (P. R. p. 202). After he had leased said trap site, he found that the said V. A. Robertson owned, or claimed to own, the land abutting thereon, and embraced in said Survey 804. For said reason, said Barron knew it would be impracticable to fish said location, without interfering with Robertson's water front privileges and tide lands and uplands. Barron then, and during the year 1910, drove three piles into the water or upon the tide lands in front of the said survey, and posted thereon a notice that he claimed this said location for a fish trap site, and immediately began to look up Robertson, the owner of the upland, in order to purchase the same from him, so as to perfect his right to the fish trap site and make it feasible and practicable to operate the fish trap thereon. However, Barron did not succeed in purchasing said

upland until the first day of March, 1911 (P. R. p. 202). Barron acquired all of the Alaska Packers' Association interest in and to said fish trap location, and the lands embraced in U. S. Survey 804, from Robertson, for the purpose to be used as a fishing site, and any and all purposes that the same could be used for in connection with the packing of salmon at the Funter Bay cannery, in which said Barron was heavily interested, and was general manager.

In the operation and carrying on of said salmon packing business at Funter Bay, it is necessary, in order to supply said cannery with salmon, to bring them from a distance in tow-boats, gasoline boats and barges. It is also necessary to have, each season, a great many timbers, in the way of piling, for the purpose of constructing fish traps and other purposes, and it is necessary to tow such piles or piling from quite a distance, most of the same being obtained from in and about Hawk's Inlet, which said last mentioned body of water is reached by Barron's tow-boats leaving Funter Bay cannery, passing down the straits and immediately in front of the land embraced in said U. S. Survey 804, and the harbor in front thereof. At the time of such towing of piles, there prevails in that locality high northern and northwesterly winds, and for several years last

past Barron and the Thlinket Packing Company, for which he was acting, had used the harbor in front of the said survey for refuge and shelter from such prevailing northerly winds. Alexander, the appellee herein, was acquainted with this fishing trap site in question, and the upland, prior to the year 1910, while the Alaska Packers' Association was fishing said trap site, and in fact constructed or assisted in the construction of the Alaska Packers' Association's fish trap upon this location.

On or about the 14th day of March, 1911, the above named appellee and his servants and employes entered upon the tide lands and the water in front of said Survey No. 804, and entered upon the navigable waters directly in front of said described land, without the knowledge or consent of this plaintiff, and commenced to drive piles upon the tide lands and waters immediately in front of and abutting upon the said land contained in said survey, at the points and places indicated on plaintiff's exhibit found at page 36 of the printed record.

Immediately upon Alexander commencing the driving of the piles last above mentioned, the facts became known to this appellant, and Mr. Barker, the superintendent of said Thlinket Packing Company's

cannery, forbade the said Alexander and his agent from driving said piles and obstructing appellant's right-of-way out to deep water (P. R. p. 316), and all of appellant's rights were made known to said Alexander at said time, and the same two or three piles that had been driven by Barron a year before were still upon the ground with the notice thereon heretofore referred to (P. R. pp. 316-7). Notwithstanding said notification and fact, the appellee, Alexander, continued driving said piles. On the 22nd day of March, 1911, and while appellee was driving the piles above mentioned, the appellant herein filed his complaint in the District Court of Alaska, Division No. 1, praying that a temporary restraining order be granted, restraining the defendant or appellee, *et cetera*, from building or erecting said fish trap in and upon said tide lands and navigable waters in front of said land embraced in said Survey 804, or in anywise interfering with plaintiff's right of possession or use of said tide lands, or in obstructing plaintiff's or appellant's right-of-way out from his land to the navigable waters of said Chatham Straits (P. R. p. 9). Upon the filing of said complaint and application of Barron, a temporary restraining order was granted pending an order to show cause, which said order to show cause

was returnable the 30th day of March, 1911. At said time a hearing was had thereon and oral testimony and other evidence submitted to the court, and resulted in the court making an order dissolving the temporary restraining order (P. R. p. 24). At the time of said hearing the fish trap of Alexander had been constructed in the manner that is indicated upon plaintiff's exhibit ..... (P. R. p. 36). Upon said hearing, Alexander testified that his fish trap was complete in so far as the lead was concerned, but needed some seven or eight more piles to complete some other parts of the fish trap (P. R. p. 514). Immediately after the dissolution of said temporary restraining order, Alexander proceeded to the completion of his trap, and also extending the lead of said trap in towards the upland of Barron, a distance of 261 feet (P. R. p. 514). This action of Alexander was prompted by being advised by his counsel that he, Alexander, was as much the owner of the upland contained in U. S. Survey 804 as Barron, and had as good a right to the same as Barron had. The changes thus made by Alexander in the extension of the lead of his trap led to the filing of the amended and supplemental complaint herein, upon which said supplemental complaint, answer thereto, and reply, this case was tried.

After all the evidence was introduced on the part of both parties, and either just before or after argument of counsel, Judge Thomas R. Lyons, the trial judge, announced, of his own accord, and without any request of the plaintiff (appellant), and in the presence of the attorneys representing both parties, that he, the said judge of said court, expected to file a written opinion in the said cause, but before doing so would visit the fish trap site and upland set out and referred to in the complaint in this cause; that some time after the trial of the cause and before the judge of the said court filed his written opinion herein, he visited the said premises, and when arrived there, the defendant was upon the ground with several men, pile driver and gasoline boat, and had destroyed the evidence of and manner in which the fish trap described and set out in the amended and supplemental complaint herein was constructed, and was engaged in constructing another fish trap, immediately in front of the shore land and upland contained in U. S. Survey No. 804 (P. R. pp. 718, 742). After the visit to the premises, the court did accordingly file his written opinion herein, from which it appears that the court took into consideration the changed condition of the fish trap, and the change that had been made in its structure after the

close of the evidence, in arriving at his decision. He states as follows:

"That such alteration in the construction of said fish trap eliminated any possible question, in his judgment, of its interfering with plaintiff's right of access from every point of his upland to the navigable waters of Chatham Straits" (P. R. p. 742).

Within the time required by law, and after the closing of the evidence and argument of counsel, appellant, by his attorneys, offered and presented to the court his proposed findings of fact and conclusions of law, which are set forth in full at pages 701-710 of the record, which said findings and conclusions the court refused to sign and allow, to which refusal plaintiff excepted, and an exception was allowed.

Immediately after the judge filed his written opinion herein, appellant filed a motion for a new trial and for the setting aside of said opinion or decision, which said motion is set forth in full at pages 710-714, inclusive, of the record, which said motion sets forth the statutory grounds, and particularly asks a rehearing upon the grounds that the court erred in visiting and viewing the premises or situs of the fish trap, and the upland referred to in the complaint, and had taken into consideration in

rendering his decision the changed and altered condition of the fish trap, and had been influenced by such new evidence in the rendition of his opinion or decision, and such proceedings by the court was an abuse of discretion and an irregularity and surprise to plaintiff which materially affected his substantial rights, and which ordinary prudence could not have guarded against. Thereafter the court made its findings of fact and conclusions of law, which are set forth at pages 49 to 51, inclusive, of the record.

Thereafter and on, to-wit, the second day of July, 1912, and after the findings of fact and conclusions of law had been made, signed and filed by the trial judge, and within the time required by law, plaintiff filed another motion for a new trial or rehearing and the setting aside of the findings of fact thus made by the court, which said motion appears in P. R. pp. 715 to 717, inclusive. This motion also contains the statutory grounds of a motion for a new trial, as well as calling the court's attention to irregularity in the trial, in the court being influenced by the changed condition of the trap and the condition it was in upon the day in which he visited the same, not being the same one complained of and set forth in the pleadings concerning which the trial was had, accident and surprise materially af-

fecting the substantial rights of appellant, *et cetera*. Both of these motions were denied by written orders of the court, and the appellant allowed exception to the ruling of the court upon each of said motions (P. R. pp. 45, 52).

The order denying motion for a new trial, on page 52 of the record, reads as follows:

"The motion for new trial herein, or the setting aside of the findings of fact and conclusions of law made and filed by the court in this cause, and the granting of a rehearing herein, coming on for hearing on motion of plaintiff, and the same being supported by the affidavit of Jno. R. Winn herein concerning the visit of the Judge of this court to the situs of the fish trap and the tract of land described in plaintiff's complaint and the change made in the construction of said fish trap, and the court being fully advised in the premises, overrules and denies said motion and further states that the change made in the construction of the fish trap by the said defendant does not cause the same to in anywise interfere with plaintiff's free ingress from the navigable waters of Chatham Straits to his upland and all parts thereof, or free egress from his upland and all parts thereof to the navigable waters of said Chatham Straits. To all of which the plaintiff asks and is allowed an exception."

After overruling the motion for a new trial or rehearing herein, the court proceeded to render its decision dismissing plaintiff's or appellant's cause of action (P. R. pp. 53-54).

Specification of Error Relied Upon.

Numerous errors are assigned and relied upon for the reversal of the opinion, decree and decision of the court herein, which are as follows, to-wit:

I.

The court erred in making an order herein on March 30, 1911, dissolving the temporary restraining order which had heretofore been sued out and obtained in this court and cause.

II.

The court erred in not making, signing and filing herein findings of fact 1 offered and tendered by the plaintiff, which said finding covered substantially the fact that the plaintiff was for several years prior to the commencement of this action, and was at the time of the commencement thereof, the president of the Tklinket Packing Company, and was largely interested in said company, and which said company was the owner of a large number of floating stock, fish boats, etc., and fish trap sites and fishing stations, which were all necessary for the conducting of its said business.

III.

The court also erred in not making, signing and filing herein finding of fact II offered and tendered by plaintiff, which said finding established the fact that the plaintiff herein purchased the trap site in controversy from the Alaska Packers' Association, a corporation, long prior to the defendant claiming any interest therein.

IV.

The court erred in not making finding of fact III offered and tendered by the plaintiff herein, which said finding establishes the fact of the taking up by one V. A. Robertson, his soldier's additional homestead claim, which abutted upon the fish-trap site location in controversy, and which said taking up was made a long time prior to defendant claiming any interest in the waters or shore land immediately in front of said homestead claim, which is designated as U. S. Non-mineral Survey No. 804, containing 5.27 acres.

V.

The court erred in not making finding of fact IV offered and tendered by the plaintiff herein, which recites the fact of the purchase by the plain-

tiff from the above mentioned V. A. Robertson, of the upland contained in his said soldier's additional homestead claim known as U. S. Non-mineral Survey No. 804, which said purchase was made by said plaintiff before the defendant ever claimed any right, title or interest in and to the shore land bordering thereon or the water front of said upland, and that plaintiff continued patent proceedings for said Survey No. 804 which had theretofore been commenced by said Robertson; and that plaintiff obtained a final receiver's certificate therefor before the trial of this cause.

That all of said findings I, II, III and IV, so offered and tendered by plaintiff, were supported by all the evidence in said cause.

VI.

The court erred in refusing to make finding of fact V offered and tendered by the plaintiff herein, which said finding recites the fact that plaintiff, by reason of owning the upland contained in Survey No. 804 is entitled to the exclusive right of ingress and egress between his upland and from the shore land, etc., to navigable waters of Chatham Straits abutting thereon, and is entitled to the exclusive and unobstructed access to said waters from all points of his upland.

VII.

The court erred in refusing to make finding of fact VI, offered and tendered by plaintiff, which in substance shows the use to which plaintiff had devoted the waters and harbor in front of his upland before defendant claimed any right to said waters, or right to build and maintain a fish trap therein, and further showing the necessity of plaintiff having the use of said waters for mooring of vessels and reaching of upland butting thereon; all of which said above mentioned facts were established in part by uncontradicted testimony and evidence, and the remaining portion by a great preponderance of the evidence in said cause.

VIII.

The court erred in refusing to make finding of fact VII offered and tendered by the plaintiff herein, which said finding established the fact of the entry of the plaintiff herein, on March 14, 1911, upon the shore land and water immediately in front of said Survey No. 804, and placing therein and thereupon several piles and a notice that he claimed the said ground and waters as a fish-trap site and station, and the wrongful entry thereon upon said premises thereafter by said defendant and doing the

acts complained of in said finding so offered and tendered; also show the false representations made and testified to by the defendant in order to get the temporary restraining order granted herein dissolved; also showing the manner in which said defendant constructed his fish trap, and extending of the lead thereof to the upland of plaintiff; for the reason and upon the ground that all of said facts so contained in said finding were either supported by the uncontradicted testimony and evidence or a great preponderance of the evidence in said cause.

IX.

The court erred in not making finding of fact VIII offered and tendered by plaintiff herein, wherein said court was asked to find, among other things, that the construction and maintenance of said fish trap by defendant had obstructed plaintiff's access to the navigable waters abutting upon his upland, and in fact had, to a great extent, cut off plaintiff's egress from his upland to said navigable waters abutting thereon, and particularly had it done so at the point or place that plaintiff had been accustomed to anchor and moor his vessels, and cut off plaintiff's access to said navigable waters from the part of his shore land best adapted for

said purpose and which had been so selected by plaintiff a long time prior to defendant initiating any rights to said shore lands or water immediately in front thereof, for the reason that the said facts set forth in said finding were either supported by the uncontradicted evidence or a great preponderance of the evidence in said cause.

The court erred in not making conclusions of law I, II and III, offered and tendered by plaintiff for the reason that said conclusions are supported in some respects by uncontradicted evidence in said cause, and in all respects by a great preponderance of the evidence.

The court erred in making, signing and filing all of that portion of the court's finding of fact II herein, which reads as follows:

"That the said fish trap, and the whole thereof, including the lead line, are situate in the waters of Chatham Straits and below low water mark,"

for the reason that said portion of said finding is unsupported by the evidence and largely against the uncontradicted evidence and entirely contrary to a great preponderance of the evidence in said cause.

That the court erred in making its finding of fact III, which is as follows:

"That defendant's fish trap does not in any manner interfere with the free ingress and egress to and from the premises hereinbefore described to the deep water of Chatham Straits, nor from any part of said premises to said water of said Chatham Straits; that the operation of said fish trap will not obstruct or interfere with the free ingress to or egress from the land hereinbefore described; and that none of the acts of the defendant with reference to the construction, maintenance or operation of said fish trap have or will obstruct or interfere with the plaintiff in the exercise of his right to free and unobstructed access to his land and every part thereof from the deep waters of Chatham Straits or from his lands, as hereinbefore described, to the navigable waters of said Chatham Straits,"

for the reason that same, in many respects, is against the uncontradicted evidence in said cause, and in all respects against the great preponderance of the evidence and admitted facts in said cause.

The court erred in making conclusions of law I and II herein, for the reason said conclusions are against law and are unsupported by the evidence.

The court erred in visiting and inspecting the fish trap site and waters and shore land in and upon which said fish trap was constructed, and the upland described in the complaint, after the close of the evidence in said cause, for the reason and upon the ground that said visit was made by the court, or judge thereof, upon his own motion and after all

the evidence and argument of counsel had been made in the cause, and for the further reason that it appears conclusively from the record in said case that upon the court's arrival at the property in question, the very thing which he desired to see had been removed, or destroyed, and a new and different fish trap and lead constructed; and these matters were all taken into consideration by the court in the making of its findings of fact herein, and influenced the court in the rendition of the final judgment herein, and is tantamount to depriving plaintiff of his property or property rights without a trial and the rendering of a decision by the court, not upon the cause of action set forth in the complaint, but the substitution by the court of a new and entirely different cause of action and rendering a judgment and decree upon the same upon his own judgment and without evidence, and without the plaintiff having his day in court; and the court should have considered the action of the defendant herein as a confession that the way the fish trap set up in the complaint was constructed, it obstructed and cut off plaintiff's free ingress to his upland from the navigable waters bordering thereon, and egress from such upland to said waters.

The court erred in not granting the motion for a new trial or rehearing herein and setting aside his written opinion filed in this cause.

The court erred in overruling and denying plaintiff's motion herein to set aside the findings of fact and conclusions of law made and rendered by the court, and granting a rehearing or new trial in this cause.

The foregoing errors assigned will be considered in this brief under the five following heads:

1st. The court below erred in not finding that the appellant had a paramount right to the use and occupancy of all of the shore lands or tide lands and waters in front of his upland, and a superior right to said fish-trap locations, as against the appellee, irrespective of the ordinary doctrine that a party who owns uplands bordering upon navigable waters is entitled to free and unobstructed access from all points of his upland to such navigable waters.

2nd. The court below erred in making its finding number three, found at pages 50-51 of the printed record, which reads as follows:

> "That defendant's fish trap does not in any manner interfere with the free ingress and

egress to and from the premises hereinbefore described to the deep waters of Chatham Straits, nor from any part of said premises to said deep water of said Chatham Straits; that the operation of said fish trap will not obstruct or interfere with the free ingress or egress from the land hereinbefore described; and that none of the acts of the defendant with reference to the construction, maintenance or operation of said fish trap have or will obstruct or interfere with the plaintiff in the exercise of his right to free and unobstructed access to his land and every part thereof from the deep waters of Chatham Straits or from his land, as hereinbefore described, to the navigable waters of said Chatham Straits."

3rd. The court below erred in holding that, under the evidence in the case, the appellant had reasonable access to the navigable waters of Chatham Straits, and in further holding that, as against the rights of the appellee, appellant is only entitled to reasonable access from his upland to the deep waters of said straits.

4th. The court below erred in visiting and viewing the premises in controversy, or the situs of the fish trap, after the close of the case, for the following reasons: (1) For the reason that the judge did so of his own free will and accord, and not at the request or solicitation of either of the parties to the action, after there had been a change in the structure or fish trap complained of in the amended and

supplemental complaint; (2) for the reason that the court misused and misapplied the information or knowledge thus gained, to the prejudice of and in a way or manner that materially affected the substantial rights of appellant.

5th. The court below erred in not granting the plaintiff below a new trial or rehearing upon the showing made.

ARGUMENT.

We will take up the several propositions of law and questions of fact and present them to this honorable court in the order last mentioned.

I.

The court below erred in not finding that the appellant had a paramount right to the use and occupancy of all of the shore lands or tide lands and waters in front of his upland, and a superior right to said fish-trap locations, as against any right of the appellee, irrespective of the ordinary doctrine that a party who own uplands bordering upon navigable waters is entitled to free and unobstructed access from the same to such navigable waters.

The fact that V. A. Robertson did, between October 31st and November 1st, 1908, have the upland mentioned and set forth in the amended and supplemental complaint duly and regularly surveyed under the Soldiers' Additional Homestead Law pertaining to the District of Alaska, is undisputed (see plat, p. 88, P. R). And, also, that the said V. A. Robertson did thereafter, on the 8th day of March, 1911, by a good and sufficient deed, convey to Barron, the appellant, the upland described in said

amended and supplemental complaint and designated as U. S. Non-mineral Survey 804, is undisputed (P. R. pp. 142-143). Mr. Barker, however, testifies that the deal for this property, as between Robertson and Barron, was closed on the first day of March, but the deed not made out until the 8th (P. R. p. 314). The further fact is undisputed that said Barron, the appellant, immediately after the purchase of this land from Robertson, diligently proceeded in the United States land office to obtain a patent, and, at the time of the trial, had furnished all necessary proof to obtain patent (P. R. pp. 101-102); and the court has found that the appellant was, at the time of the trial of the case, the owner of the premises and land contained in said U. S. Non-mineral Survey 804 (P. R. pp. 50-51). The fact that the Alaska Packers' Association, a corporation, had fished the fish-trap location in controversy, prior to 1910, is also an admitted fact in the case (P. R. p. 517). Further, it is uncontroverted that Barron purchased whatever rights the Alaska Packers' Association may have had in and to said fish-trap location, and, in 1910, drove some piles upon the location in question, and placed a notice thereon claiming the site as a fish-trap location (P. R. p. 316), and this notice and piles were still

upon the ground when the defendant Alexander, in 1911, invaded the premises and location in controversy. Alexander was also notified that Barron intended to fish this location the year of 1911.

The land department held, in the case of *Northwestern Fisheries Company,* 39 L. D. 598, that an approved survey for a Soldiers' Additional Homestead location constitutes, in advance of the filing of application in the local land office, "a legal appropriation under the public land laws," and it confers "legal rights" within the meaning of those words, within the proclamation creating the forest reserve. In a later case decided by the secretary of the interior, it has been held that, when a party enters upon public lands subject to appropriation by the exercise of the rights conferred under the Soldiers' Additional Homestead Scrip Act, and commences a survey thereof, and prosecutes his proceedings to a patent with diligence, the homesteader's rights relate back to the time of commencing the survey. In other words, simply the commencing of the survey segregates the land sought to be patented from the public domain, providing patent proceedings are prosecuted with diligence. This case we have not at hand, but will present it to the court on the oral argument. However, in the case before

the court, the survey, field notes, plats, and so forth, had all been passed upon and approved by the surveyor general of Alaska before the appellee attempted to initiate any right to the fish-trap location in question; and this brings appellant's case directly within the doctrine laid down in 39 L. D. This being true, Barron's rights in and to his upland and right-of-way to deep water dates back either to October 31st, 1908, the time of the commencement of the survey by Robertson, or June 16th, 1906, the date of the approval of the same by the surveyor general of the District of Alaska.

On June 26th, 1906, congress passed "An act for the protection and regulation of the fisheries of Alaska" (Act of June 26, 1906, ch. 3547; 34 Stat. L. 478; p. 22, Federal Statutes Annotated, Supplement of 1909). The fourth section of said act provides, among other things, "It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance." This statute was not called

to the attention of this honorable court in the case of *Columbia Canning Company vs. Hampton*, 161 Fed. 60. We contend that congress, by the passage of the act in question, recognized the right of parties to fish in Alaskan waters by means of fish traps, and so forth, and furnished a protection to anyone who has commenced the construction of a fish trap or initiated a right to a fishing trap location, and the force and effect of the statute or act in question is tantamount to granting the privilege of building and constructing fish traps in the waters of Alaska, and that any person who has initiated the right to a fish-trap location or commenced the construction of a fish trap, if prior in time, will be prior in right. The appellant in the case before the court was prior in time, by reason of having purchased the location in question from the A. P. A. Co. and driven some piles and placed a notice thereon, and for these reasons, we contend, that, leaving out the question of an upland owner being entitled to free access to navigable waters bordering upon his land, Barron in this case has a prior right to the fish-trap location as against Alexander, the appellee.

II.

The court below erred in making its finding number three, found at pages 50 to 51 of the printed record, which reads as follows:

> *"That defendant's fish trap does not in any manner interfere with the free ingress and egress to and from the premises hereinbefore described to the deep water of Chatham Straits, nor from any part of said premises to said deep water of said Chatham Straits; that the operation of said fish trap will not obstruct or interfere with the free ingress or egress from the land hereinbefore described; and that none of the acts of the defendant with reference to the construction, maintenance or operation of said fish trap have or will obstruct or interfere with the plaintiff in the exercise of his right to free and unobstructed access to his land and every part thereof from the deep waters of Chatham Straits or from his land, as hereinbefore described, to the navigable waters of said Chatham Straits."*

We take the position that the above finding of the court is absolutely against the great preponderance if not the uncontradicted evidence and testimony in the case, and, to prove this to this honorable court, we have to take the laboring oar. Hence, it will be necessary for us, in order to plainly and concisely present our view of the case in this respect, to quote considerable of the testimony of the various witnesses who testified, and think that we will be

able to show to the court, beyond any peradventure or controversy, that we are right, not only from the testimony and evidence of all of the witnesses who testified in the case concerning the matters set forth in said finding of fact of the court, but by the admission of the appellee himself, when the case was called for trial.

John W. Dudley, formerly register of the United States Land Office at Juneau, Alaska, was called as a witness on behalf of plaintiff (P. R. 120 to 140).

This last-named witness testified, among other things, that he had been upon the upland embraced within said Survey No. 804, and had observed the fish trap constructed in front of said upland and that it was all in front of said upland, that the plat marked Exhibit "D," being plaintiff's exhibit, appears to show the trap as it was located and about the position it occupied on the ground (P. R. 132-133).

On page 133 is the following question and answer, namely:

"Q. Now, I will ask you, Mr. Dudley, when you were out there (upland) at this time if you noticed as to whether or not the lead from the pot and fillers (spillers) and heart of the trap that was

being fished upon the ground extended out to high-tide mark, low-tide mark, or the upland, and how far it did extend?

A. When I was upon the ground the piles did not extend up to low-water mark. I should judge it was about half tide when I was there, if I remember right, and there was some distance of water between the piling and the shore, but there was a cable stretched up to where, I should imagine, was the high-water mark, and that was supported by a cross or shear, leading over this and anchored to some point apparently on the upland."

Lloyd G. Hill, a witness on behalf of plaintiff, testified at said trial that he was a witness at the preliminary hearing of this cause when a temporary restraining order issued herein was dissolved; that prior to being called as such witness at such preliminary hearing he had been upon the ground embraced in U. S. Non-Mineral Survey No. 804; that at said preliminary hearing he identified plat marked Exhibit "C"; that he prepared said plat from an actual survey upon the ground (said plat is marked Exhibit "C" and "E", "C" being the exhibit letter at the preliminary hearing and "E" the exhibit letter on the trial). (See P. R. 145 and also plat on following page.)

This witness further testified that he determined the corners of the claim and located the position of nearly all the piles, and that the piles

extending towards the shore and nearest to the shore were determined accurately (P. R. 146).

That he made an actual survey of the fish trap by means of a transit, chain and tape line (P. R. 149).

On page 149 of the record it appears that this witness went on the ground and obtained the data contained in the plat marked Exhibit "E" on the 28th day of March, 1911, and on the following page of the record he states that at that time the number of piles driven in said trap was forty-three; that at said time the lead of said trap extended to a point marked on said plat "ebb tide," and that at said time the entire length of said fish trap was about two hundred and fifty feet (P. R. 151; plats referred to herein are on pages 147 and 164 of the record and were marked Exhibits "E" and "D", respectively, on the trial of this cause).

On pages 151 and 152 the position of the objects marked on said plat as bare rock and reef he located by traverse, and that the entire length of said fish trap on March 28, 1911, or at the time of the preliminary hearing, was two hundred and fifty feet.

It further appears from Mr. Hill's testimony on pages 152 and 153 of the record that at said

time, viz., on March, 28, 1911, and at the time of the preliminary hearing, that a straight line drawn from the westerly boundary line of said Survey 804 into the waters of Chatham Straits would bring the nearest pile of said trap to said line so prolonged within a distance of about two hundred feet; that a prolongation of the easterly line of said survey out into the waters of Chatham Straits would bring the nearest pile of said fish trap to said line so prolonged within a distance of about four hundred and sixty feet. That the entire water front of said Survey 804 by a straight line is 788.7 feet, and the meander line of said survey along the water front approximately 800 feet (P. R. 152 and 153).

On pages 153 and 154, the witness testifies to soundings made by him in the waters of Chatham Straits in front of said Survey 804 on March 28, 1911, or just prior to the time of a preliminary hearing in this cause, and states that at said time there was 21 feet at the northwest end of the trap, and up to the line of the lead, as the lead existed at that time, continued 16 feet.

"By the Court: That means ebb tide.

A. Yes, sir. (P. R. 154.)

Q. Sixteen feet at the end of the lead as it was then constructed?

A. Yes, sir.

Q. Now, then, did you make any examination at that time to find out the condition, Mr. Hill, of the ground that was covered with the water and as to whether or not there were boulders there or anything of that kind?

A. Yes, sir, I can say, yes, sir. Of course, pretty hard to tell anything below the surface of the water, but ground between low water and high water was very rocky, large boulders, three or four feet high." (P. R. 154.)

This witness further testified that he again visited the premises about a year later, namely, on March 10th or 11th, 1912, which was a few days before the trial of this cause, and with reference to the changed condition of the fish trap, etc., states as follows:

"Q. This year?

A. Yes, sir.

Q. Did you make any other observations as to the fish trap that was then standing upon the ground and also make other soundings or anything of that kind?

A. I did; yes, sir; I made other soundings there.

Q. Who was with you?

A. Well, there was Captain Mason and the deckhand on the 'Anna Barron,' named Steve, I don't know his last name; Mr. Barron, and Mr. Barron's two pilers—I think two piledriver men.

Q. Now, I will hand you Mr. Hill, Plaintiff's Exhibit 'D' for identification, which Mr. Dudley testified concerning, and ask you who drew this exhibit?

A. I drew this map.

Q. How did you get the data from which you drew the map, Mr. Hill?

A. Well, I had the notes from the former survey and what additional notes I wanted to take I made them from actual survey upon the ground.

Q. Who, if any one, aided you in making the soundings at that time?

A. Why, Steve, the deckhand on the 'Anna Barron,' and two pilers and myself the last time, and the first time Captain Mason and Mr. Barron. We were all present in the boat.

Q. Now, this map and plat which you have, marked 'D' for identification, is just the same so far as the data thereon placed as is on Plaintiff's Exhibit 'E,' that is, so far as they are extended on Exhibit 'E'?

A. Yes, sir; I think so.

Q. Then, you made some additional measurements and—how, Mr. Hill, did you find the structure that you had seen upon this ground, called the fish trap, on your previous trip, with respect to the one you found when you made this trip last week?

A. Well, the first time I was there the fish trap was more or less incomplete.

Q. Yes.

A. The pot and the spiller and the heart—those things they were not nearly as uniform as they are now, and the lead line as it extended from the near-

est end at that time toward the shore a distance of 261 feet.

Q. How many more piles are there in that lead than was there at the time that you testified upon the hearing of the motion to dissolve the temporary restraining order?

A. How many more—there is 14 piles, has been —15, I think.

Q. Yes.

A. One is out.

Q. And where they have been driven with respect to the end of the lead that you found, as you have testified to, and as it is marked on Exhibit 'E'—where were they driven with respect—

A. They had been driven on the line of the lead as it then existed in a northeasterly direction toward the shore.

Q. Then it extended 261 feet in further toward the shore than it did when you were out there on that other trip?

A. Yes, sir.

Q. And how many piles did you say had been put there?

A. Fifteen."

On page 158 of the record, this witness testified that he made soundings from the east corner of the fish trap over to the bare rocky point (shown on plat Exhibit "D"), and from that point ran back a line of soundings toward the pile nearest in-shore of the fish lead. From that pile a range of sound-

ings were made on a line through to what is known as U. S. Non-Mineral Monument No. 804, simply as fixing the position of the soundings. All these soundings were taken at low water on March 11, 1912, and are marked on Exhibit "D". That witness found the depth of water at the pile nearest the shore to be eight feet; that the stage of the tide would be low water at 1:50 in the afternoon and soundings were commenced at 12:30 and completed about one o'clock. That the June tides would be lower probably by six feet (600 feet in record incorrect) than the March tides; that at the lowest tide the depth of water where the last pile in said lead, or the pile nearest the shore, the water would not be more than two feet deep (P. R. 158-159).

This witness further states that the ground abutting the water front of this claim is a steep, rocky bluff on the easterly portion, with the exception of a very little corner at the extreme east, which is rather good ground; that on the westerly end at low tide the area between low and high tide is covered by large boulders and rock, but at extreme high tide there is quite a gravelly beach on the westerly side (P. R. 159-160).

Further testifying, the witness states that a prolongation of the lead line would intersect the

shore line at a point 172 feet from the east corner of the claim; that this 172 feet is very rough ground and the banks quite bluffy and steep. That a prolongation of a line from the westerly boundary of said upland out into deep water to the nearest pile of the fish trap would leave a space on the westerly end of said claim of about 100 feet (P. R. 162); that this end of the upland is covered by large boulders.

It also appears from this witness' testimony that at the time of the preliminary hearing, by a prolongation of a line extending from the most westerly pile of the trap to intersect the upland left a space on the westerly end of said survey 804 of about 200 feet. So that between the time of the preliminary hearing and the trial of this cause such change had been made in said trap as to reduce the space, by a prolongation of the westerly end line to intersect the trap as aforesaid, to 100 feet.

Further testifying, the witness states that on March 11, 1912, the distance from the pot and spiller and the lower end of the trap to the object marked on the plat "reef" was 365 feet (P. R. 162-163); and the same distance from the object marked on the plat as rocky point (P. R. 162-163).

That the reef and rocky point were bare, and there was a passageway between the reef and the bare rock, and witness could hardly go through such passageway with a row boat, etc.

That the soundings shown on exhibit marked "D" are correct (P. R. 164).

That the entire length of the trap on March 11, 1912, was 520 feet, as against 250 feet at the time of the preliminary hearing.

Upon cross-examination this witness testified that he fixed the line at low tide at three or four different points, namely, at the prolongation of the east boundary of the claim, the prolongation of the west boundary to mean low water and at the point marked 250 feet on the plat from the shore into the lead (P. R. 170).

James T. Barron, the plaintiff in this case, testified as a witness in his own behalf:

That he is the president and the principal stockholder of the Thlinket Packing Company; that said company has a cannery at Funter Bay, Alaska; that Funter Bay appears on chart marked Exhibit "B," and is the place where said cannery of the Thlinket Packing Company is located; that Funter

Bay is distant from survey No. 804 about five miles (P. R. 187 and 189).

That the said cannery at Funter Bay has a capacity of 3,000 cases of salmon per day; that fish traps are used by said company to catch salmon for the purpose of supplying the cannery with fish (P. R. 191).

That the principal part of the piles used in the construction of the company's traps are obtained down Chatham Straits, Peril Straits and Freshwater Bay; that they go down near the ground embraced in Survey 804 for said piles; that in 1911 they used 1,100 piles for fish trap purposes; that all of said piles were brought from a point south of the ground contained in Survey 804, except some on the beach; that they used a tow-boat for the purpose of towing piles, and that the "Anna Barron" and the "Buster," two boats belonging to plaintiff's company, are used for the purpose of towing piles for said Thlinket Packing Company (P. R. 194).

Plaintiff further testified that he first became acquainted with Survey 804 several years ago when Captain Crockett was captain of the boat; that said Crockett used to run in there in a north wind for anchorage (P. R. 195).

Witness testified that he purchased any and all claims which the Alaska Packers' Association had in fish-trap locations in front of said survey about the time he purchased the upland, or rights of V. A. Robertson in the upland; that prior to said time he had a lease to said fish-trap location from the Alaska Packers' Association; that at the time he leased the fish-trap location, which was in 1910, he intended to use the upland as a fishing site, but found the same had been taken up by Victor Robertson, and so on March the 8th, 1911, obtained a deed from Robertson for said upland embraced in said Survey No. 804 (P. R. 202).

"Q. Prior to this time did you know as to whether or not this was a place for anchorage and harbor also?

A. Oh, yes.

Q. Then, did you cause anything to be done in regard to indicating your claim to this property before you went below in 1910?

A. Well, I gave orders to drive piling there, which I did in the spring of 1910, also to hold the ground and gave notice that I claimed the right of a fishing site there, like it has been the custom." (P. R. 203).

Witness further testified that he put up a notice with his name and that it was a trap location (P. R. 203).

This witness corroborated the testimony of Hill and Dudley with reference to the web running from the lead of the trap being fastened to the shore, etc. (P. R. 206).

Also, that the harbor in front of said upland is protected against north winds, etc. (P. R. 217).

"Q. Now, Mr. Barron, I will ask you from your experience * * * with these cannery steamers * * * suppose this man Alexander (the defendant) had only constructed his trap with the pots and spillers, etc., as they are indicated upon this Exhibit 'E' and extended his lead up to where he had it when the temporary restraining order in this case was dissolved, being the little cluster of piles just opposite the words on this plat 'Barron's Piles,' now cut off—I will ask you as to whether or not a structure of this kind would obstruct the entrance of steamers the size of the 'Anna Barron,' 'Georgia' or other steamers that may go in there, from the entrance to this harbor and the upland?

A. It would be quite dangerous to go through there at times, especially when the tide or the winds were blowing. * * *" (P. R. 217-218).

This witness testified that with a fish trap in front of the upland embraced in Survey 804 it would be impossible to go in there with the "Anna Barron" and anchor with a raft, etc., even as the trap was constructed at the time of the preliminary hearing (P. R. 219).

This witness also testifies that he visited said

survey with Mr. Hill when soundings were made by Hill; that he saw the soundings made at the last pile nearest the shore and the depth at that time was eight feet; that this was an hour before low tide.

"Q. I did ask you if there was any chance, Mr. Barron, even though there was no web ever been strung between that last pile and the upland, for any size of gasoline boat, or any other boat, to navigate between the upland and that pile at ordinary low tide?

A. No; a small gasoline boat could go there. Three big boulders there, probably three or four feet long, high; they entirely close up along in between, entirely; along the shore line you might get a depth of, say, four or five feet and get on top of a boulder and you'd have three or four or five feet less of water (P. R. 222).

Q. I understand when you was out there at ordinary low tide that was entirely closed up from that pile on up to the ordinary line of high tide.

A. Yes.

Q. No chance of getting through there unless you ran through his trap?

A. No." (P. R. 222).

Witness states that the "Anna Barron" is 90 feet in length and draws 8½ feet of water (P. R. 225); that the only place for landing boats, etc., in front of said survey is about opposite the cabin near the westerly side line of said survey (P. R. 223).

"Q. There is about three hundred or four hundred feet near the westerly end line?

A. Northwest corner.

Q. Yes; of your claim, and that will be a place for landing, and so forth?

A. Yes." (P. R. 223).

Witness further testified that if he desired to wharf out, that this trap, as constructed by Alexander, would prevent his so doing.

"Q. Now, I will ask you, Mr. Barron, what is it that makes this ground in and about this trap and between the trap and the peninsula marked 'bare rock'—what makes that better anchorage ground than this out to the eastward of that?

A. Because you are closer to the lea shore. (P. R. 260-261.)

Q. Now, Mr. Barron, you testified, I believe, in answer to a question of Mr. Jennings', about how far you would have to anchor out from the upland of this Survey 804 in case that you would go in there with a steamer like the 'Anna Barron' and with a tow of logs? I don't know whether you answered that clearly or not.

A. You couldn't go there at all; impossible the way the trap is completed, completely cuts you out of the harbor. (P. R. 263.)

Q. Indicate—how is that, Mr. Barron?

A. The course of the trap is right across the harbor there. * * *" (P. R. 263.)

Fred Barker, a witness on behalf of plaintiff, testified: That he is the superintendent of the

Thlinket Packing Company and that the plaintiff closed the deal with Mr. Robertson to purchase the latter's rights in the upland embraced in Survey 804 on the first day of March, 1911 (P. R. 314).

That he is acquainted with the defendant; saw him on March 14 (1911) on a pile driver at the fish-trap location in front of Survey 804 (P. R. 315).

That on said date at said place had a conversation with the defendant, and the defendant asked witness if certain location piles were Mr. Barron's piles, and witness stated they were and that there was a notice nailed upon the pile, and the defendant answered that he would respect that but expected to be enjoined and would fight it out in court (P. R. 317-318).

That he was a witness upon the preliminary hearing; saw the fish trap prior to the preliminary hearing, and that the defendant had since said hearing driven about forty-three piles (P. R. 319); that defendant Alexander testified upon the preliminary hearing that his trap was completed and that he would drive no more piles inshore from the lead as it was then (P. R. 329). The witness saw the fish trap again on April 7, 1911, and there were nearly eighty piles in the trap altogether, and the trap was

260 feet longer in toward the shore. That he was present when Mr. Hill made the soundings on March 11, 1912, and the figures shown on the plat marked Exhibit "D" are correct (P. R. 335). That the most practicable and best place to build a wharf is from a point in front of the cabin on the upland and that to build such wharf from said point would intersect the fish trap of defendant (P. R. 337).

T. H. Mason, a witness on behalf of plaintiff, was called and testified:

That he was a master mariner, and had followed the sea most of his life; that he is well acquainted with the waters of Alaska; that he had been running on the inside passage to Alaska for the last twenty-five years as master of a vessel (P. R. 347).

That he had been all over the waters of Southeastern Alaska, and knows Funter Bay and the Funter Bay cannery, etc. That he is at present master of the "Anna Barron," a steamship engaged in the fishing business, towing trap piles, lighters, etc., and is one of the cannery tenders of the Thlinket Packing Company; that he has been master of the "Anna Barron" for three years, and during that time said "Anna Barron" has been

engaged in towing fish, lighters, piledriver and piles (P. R. 348-349).

That south of Funter Bay towing has been confined to Kelp Bay and Peril Straits. That he knows Survey 804; that the cove or little harbor in front of said survey is a good harbor against northerly winds and northwesterly winds; coming to the northward it is an excellent harbor.

That he has had occasion to go into said harbor with a tow of piles from Kelp Bay (P. R. 351); that this harbor is much nearer to the cannery than Hawk Inlet and more convenient to go in there when on the way to the cannery, etc. (P. R. 351).

This witness corroborates Hill and Barker with reference to the fish trap as constructed in March, 1911 (P. R. 355); that he was present at the preliminary hearing and heard the defendant testify.

This witness was asked a question as to whether or not the defendant testified at said preliminary hearing that his trap was completed; objection was taken and allowed, to which plaintiff excepted (P. R. 359).

This witness fully corroborates the testimony of the other witnesses on behalf of plaintiff with reference to the changed condition of the lead of

said fish trap between the date of the preliminary hearing and this final hearing (P. R. 360); also that the defendant had his line or wire fixed to the last pile and a shear on the beach and the web was attached to the wire and hung down to the water (P. R. 361).

Witness also assisted in making the soundings and fully corroborates Mr. Hill and Mr. Barker (P. R. 362).

"Q. Now Captain, I will ask you if you have ever had any experience in leading in there—in making soundings on the right hand side of the lead of the trap as you come into Barron's claim 804?

A. I have paid particular attention to the subject out to 600—from 500 to 600 yards north from this trap to the eastward, and I sound the bottom and I know, if I have any judgment, that it was—that the lead would strike, it was rocky and the nearer I approached the trap from the east the less rocks I had to contend with (P. R. 363)."

Witness further testified that the bottom, to the east of the trap, so far as his judgment is concerned, "provided you are to anchor or to drive piles, this I don't think you can drive in the ground * * * because the bottom there is rocky and there is a shelf of rock making off, right off here * * * making off from the upland in a westward direction at right angles to this plat"; that in taking a

steamship into this harbor he would anchor between what is called the bare rock and the row of Barron piles, provided the fish trap was not there (P. R. 364-365).

This witness corroborates the testimony given by the witnesses that would be impossible to go into this harbor with a tow of logs without running into the fish trap (P. R. 365).

This witness fully corroborates Hill's testimony concerning the tides, etc., (P. R. 372).

By the Court: "Now Captain, I would like you to tell me all the reasons you know against the feasibility of the construction of a wharf from the end—from the easterly end of this survey out to deep water?"

A. Well, simply, Your Honor, just as I stated before. You have an abrupt bluff that makes up high, it shelves down as far as I've seen below water, nothing but rocks to the low water mark. Now, what is beyond that we have found hard bottom, and I don't know whether is rocks or not. Sometimes you can put a pile on and drive it, it will go down a foot and strike hard bottom and then you can get it no further; but this place here which I've just represented, that is certainly an abrupt bluff, and it is almost impossible at high water to walk past this place unless you get up on the timber land.

Q. Now, I have asked you, Captain, to state all the reason—I want all the reasons without putting any suggestions to you against the feasibility of the construction of a wharf at any point beyond the

lead line of the defendant and the prolongation of the easterly end line of plaintiff's?

A. I think I have stated my reasons for not building a wharf there.

* * * * * * * * * *

Q. And those are the only reasons you know of against the feasibility of a wharf at that place?

A. Well, it is not—a wharf built there wouldn't be as secure there for safety as one here.

* * * * * * * * * *

MR. WINN: The Court wants all the reasons.

A. For the first place, there is a good tide here and in the second place, I think, with a southwest wind we have the longer reach to draw, and here maybe 500 feet from this place the wind does not have the effect that it would here." (P. R. 410-411).

* * * * * * * * * *

The witness being further questioned by the court testified that it would cost a good deal more to put a wharf from the point indicated by the court and further, that he doesn't think a wharf could be constructed, *with any safety*, from the bluff out to the westward; that it is impracticable; also, in answer to a question by the court, the witness testified that the place indicated by the court would not be a good place to build a wharf for the further reason the more "you get this way" the

more you have to contend with the wind from the northwest and west. (P. R. 413).

Cap. Thornton testified on behalf of plaintiff:

That he has followed steamboating for nearly twenty-five years; has served in every capacity up to captain; that he is at the present time master of the steamship "Georgia", (a passenger and freight steamer) running between Juneau and Skagway and Juneau and Sitka, Alaska; that he knows Funter Bay, also the little harbor or cove in front of Survey 804 (P. R. 416-417).

That he has known said harbor for a good many years; that he has noticed the winds as they blow up and down this shore (Chatham Straits), especially the northeast wind; that the stiffest breezes between Hawk Inlet and Funter Bay is beyond the little bight (harbor in front of Survey 804) to the northward of it (P. R. 419).

That he has seen the fish trap of defendant as constructed at the time of this hearing or trial; that the manner in which it was constructed, with a cable strung from the last pile nearest the shore and attached to something beyond the line of ordinary high tide, or say, between the line of ordinary high tide and the low tide would, in the

estimation of the witness, close the ingress and egress to and from the upland embraced in survey 804 (P. R. 420-421).

Corroborates witnesses concerning the wind, etc. (P. R. 423).

"Q. Now Captain, from what you saw and know of this little cove out there in front of Barron's property would it, in your judgment, be possible to maintain a wharf in there so that you could have ingress and egress to and from that wharf to the upland of Barron with this fish trap there constructed the way it is?

A. No, sir; I certainly wouldn't take a vessel inside of that fish trap." (P. R. 432).

Testifies that if the depth of water at pile of trap nearest the shore was eight feet on March 11 (1912) that at extreme tides there that would be about seven feet plus these soundings less; that would make it less than one foot depth of water at extreme low tide at nearest pile to shore (P. R. 434-435).

Charles Carlson called as a witness on behalf of plaintiff, testified:

That he is pilot on the steamship "Georgia"; that he has seen the fish trap of defendant in front of survey 804, and that the same obstructs the entrance to the upland embraced in said survey (P. R. 438-439).

C. J. Alexander was called by plaintiff as a witness and statement made by counsel that he was, of course, an adverse witness, being the defendant in the case (P. R. 448).

"Q. Didn't you testify, Mr. Alexander, on the motion for a dissolution of the temporary restraining order, that the most feasible and practicable place, or substantially to that extent, to land on this upland was along this sandy beach just where I have indicated? (near the words "mean and high")? (P. R. 449).

A. Well, I wouldn't commit myself, Mr. Winn. I wouldn't deny that, this question, for the reason that the preliminary hearing was a year ago and I was on the stand for three or four hours and was asked a great many questions. The lawyers put in that testimony and my mind is not clear on all the things. I wouldn't deny it. (P. R. 451).

Q. Well, now, didn't you testify upon that hearing for the dissolution of that temporary restraining order when the following question was put to you in this manner, didn't you answer it as follows: "Q. On both sides of this little bay, it is rocky?" You answered: "Very rocky formation; yes, sir." Now, did you answer that question that way?

A. I think possibly I may have; yes, sir." (P. R. 452).

Witness testified that he completed the trap as near as he remembered, a few days after the dissolution of the restraining order (P. R. 457).

That he extended the lead towards the shore 200 feet or more after the dissolution of said re-

straining order (P. R. 459).

"Q. Now, Mr. Alexander, you know upon the hearing to dissolve the restraining order that the question that was being tried then was as to whether or not your structure as you had it then built obstructed the free ingress or egress in and to the property of Barron from the deep water or not. You know that was the question that was being tried?

A. Yes, sir. (P. R. 462).

Q. Now, then, you at that time only had the portion of your fish trap constructed that is indicated on this Exhibit "D" that extends from what is marked upon here "Barron's Piles" down to this word along here "Alexander's Piles"—that is the only length of the trap that you had constructed at that time, wasn't it?

A. Yes, sir. (P. R. 462).

Q. Now, then, since that time you had the piles put in that are indicated in black lines here that extend out toward the shore, didn't you?

A. Yes, sir. (P. R. 463).

Q. Now, then, isn't it a fact, Mr. Alexander, that you testified on that application that the reason why your trap as it was then constructed didn't interfere with boats going in and turning around and coming out up to Barron's property was because that lead was some where 250 or 300 feet from the shore line.

A. Well, I don't remember that question asked, Mr. Winn, as it was put to me. I do remember a question that was asked me regarding the opening in there. I testified that. I do remember, that I could not drive the piles in any further." (P. R. 463).

Witness testified that the trap is obstructing the access and egress to that portion of the claim covering the front of it (P. R. 467).

Also that he may have testified at the preliminary hearing that the trap as then constructed didn't interfere with the ingress and egress to and from the upland belonging to the plaintiff because the end of the lead was some 500 or 600 feet from the shore (P. R. 468).

Witness being asked the question as to what portion of the upland his fish trap obstructs the ingress and egress to and from the navigable waters of Chatham Straits, stated as follows:

"I would say that the trap obstructs that portion of the claim or the access or egress to that portion of the claim which the trap covers, taking a right angle from the meander line of this claim out on either side of the trap. With that line you would have 200 feet or 400 feet or 600 feet, I would say the trap obstructs that much of the frontage." (P. R. 471).

Q. Well, now, isn't it a fact that the most natural place and feasible place for landing on Barron's property is along on that beach just within that distance which you have just now described?"

Witness answered the foregoing question by saying that it would not. (P. R. 472).

"Q. Now, let me ask you, Mr. Alexander, if the following question wasn't put to you on the exami-

nation on the hearing for a dissolution of that temporary injunction and you answered it as follows? "Well, isn't your trap constructed in a sort of cove? A. Yes, right in a sort of cove. Q. Now, isn't that the most natural place for the landing of boats in that cove? A. Yes." (P. R. 472).

Witness admitted he had so testified on the preliminary hearing of this cause (P. R. 472).

Witness admits that since the driving of the additional piles on the lead of said trap towards the shore that he does not contend that a boat the size of the "Georgia" would be able to go in there and circle around (P. R. 507).

The witness on direct examination was propounded the following questions by Mr. Winn:

"Q. I ask you if it is not a fact that you said awhile ago to Mr. Cheney that the reason why you continued this lead out the distance you say you did after the hearing on preliminary injunction was that you followed the advice of your attorneys in this respect?

A. That is what inspired me to try to continue it; yes, sir.

Q. And they advised you that Mr. Barron did not own that upland and that you had just as much right even to drive clear onto the upland as Barron had?

A. That was the substance of their advice; yes, sir.

Q. Now you did testify on that hearing, [hearing to dissolve preliminary injunction], however,

did you not, Mr. Alexander, that it was impossible for you to drive any more piles out in that direction along that lead line?

A. That I believe, yes, sir; I testified to that as my opinion at that time.

Q. Then you did think at that time that your trap was complete, didn't you?

A. Yes, sir.

Q. And you testified that your trap was then complete, didn't you?

A. No, I don't believe I did; that it was complete, with the exception of a portion outside, Mr. Winn.

Q. Yes, complete with the exception of those eight piles you were going to put in?

A. Yes, I think so." (P. R. 504-505).

"Q. Do you know how many feet, Mr. Alexander, that you continued the driving of those piles that is indicated on this map, Exhibit 'B', from the piles, 'Barron's Piles', out to the end of the piles; have you ever measured that?

A. I don't think that I ever measured that additional distance that was covered there.

Q. Well, now, Mr. Hill measured it and the testimony here is that it is 261 feet. Do you want the court to understand that that is not correct?

A. No, I don't dispute that measurement." (P. R. 506-507).

On page 485 of the record it will appear that the following questions were propounded to the witness Alexander by Mr. Winn, concerning what

the witness testified on the hearing to dissolve the temporary restraining order.

"Q. Now, then, I will ask you if the following questions were not put to you by Mr. Burton and you answered them as follows: 'Q. I will ask the question whether it will prevent our free ingress and egress from the shore lands and from the tide lands at this point?

A Why, I mean it will not in no way. Q. Now, explain to the court why it will not. A Because my trap is out in navigable water; because there is plenty of room inside to operate vessels without interfering with the trap in any wise?'

A. I think I thoroughly understand the question. It was pointing to free access in and around the near end of this lead at that time that way; yes, I answered that question, that I did."

The defendant called as witness to testify on his behalf J. G. Rowe and J. H. Magill, but they in no way contradict any of the material testimony in this case.

H. P. N. Birkinbine was also called as a witness for the defendant. This witness' testimony consists chiefly of fixing the distance between the reef and the fish trap; the depth of the water at low tide, and of some soundings which he claims to have made. He does not contradict Hill's testimony with reference to the correctness of plat marked Exhibit "D" so far as the same shows the position of the

fish trap with relation to the upland.

Numerous questions were asked this witness in order to ascertain how he obtained the figures of 4.9 feet as being low tide in front of the upland at Chatham Straits and finally admitted that he made no soundings on the east side of the trap at all; that his instructions were confined to the west side, and he practically limited his investigation to the west side; that he does not know how the shore line runs from the said easterly line of Survey 804 (P. R. 625).

In concluding this statement of facts, we would like to call the court's attention to the plat or map following page 35 of Volume 1 of the Printed Record. This map and plat shows, among other things, the fish trap of Alexander as it was at the commencement of the action, and at the time of the hearing on the order to show cause and which was, according to the evidence in the case, completed, as Alexander contended at that time, with the exception of eight piles which were to be put in on the outside of the pot or spiller. Then, following page 146 of the same volume of the record, is a colored map or plat which was offered in evidence by plaintiff showing practically the same as the other plat above mentioned except in colors. Then, following page 163

of the same volume, is the plat which Mr. Hill testifies largely concerning, and is referred to as plaintiff's Exhibit "B", showing measurements, distances and Survey No. 804 and having a great deal of data thereon and particularly showing the additional piles put in the lead of the trap after the hearing on the motion to dissolve the temporary restraining order. The additional piles that were driven by Alexander after the hearing on said motion are marked in black, and show that the lead was extended 261 feet after the order was made dissolving the temporary restraining order. Immediately following page 548 of Volume 3 of the record will be found the defendant Alexander's exhibit which was made by his witness, Mr. Birkinbine. The data contained thereon and the testimony of Mr. Birkinbine, as well as that of Mr. Hill, plaintiff's surveyor, does not show that there is any material difference in the map and plat made by Mr. Hill for Barron and this map made by Birkinbine for Alexander. In fact Mr. Birkinbine does not contradict Mr. Hill upon any material fact in the case, the two witnesses representing opposing parties, but their testimony in all respects materially the same.

It will be observed that there is practically no

dispute with reference to the position which the fish trap in controversy occupies and with reference to the upland contained in Survey 804. On each of the plats made by the surveyors representing the respective parties it will appear that the fish trap is in front of said upland. From the plat marked Exhibit "B", and the testimony of Mr. Hill, and which is undisputed, it is very clear that out of 800 feet frontage of said Survey 804, this trap directly takes up, between the navigable waters of Chatham Straits and the upland, a total of about 522 feet, leaving a space of 172 feet on the easterly end of said upland which is probably not directly obstructed. But the evidence shows that this easterly end is covered by large boulders and rocks between the area of low and high tide and exposed to wind and waves and that the character and condition of the upland is of such a nature that it is not feasible or practicable to make this an outlet from the upland to the deep waters of the Straits. And it also appears from the testimony that this portion of the waterfront between high and low tide, as well as out into deep water is of such a nature that it is unfit for the anchoring of vessels or the driving of piles for the construction of either a fish trap or a wharf. Alexander, the appellee or defendant, con-

cedes in his testimony, that practically all of that portion of the upland lying westerly of a point where, if the lead of the trap was extended, it would intersect the lower boundary of the upland, is entirely cut off and obstructed by reason of the fish trap. We believe that in considering the testimony whether or not the fish trap of the defendant interferes with the plaintiff's right of access to navigable waters and the ingress and egress from and to the upland to navigable waters, the testimony of Captain Thornton, Mason, and Carlson, should be given great weight. No other navigators have testified. The defendant called Captain Rowe, he is a man who runs and operates a gasoline boat which he owns, but he nowhere contradicts the testimony of Captain Thornton and Mason and Carlson pertaining to the fish trap obstructing egress to and from the upland to navigable waters. Then, too, arises the question as to the use which Barron had put the water in front of this property to, in the way of anchoring vessels which he used in connection with his business. We say without fear of successful contradiction that it conclusively appears from the evidence that this little cove in front of Survey 804 is a harbor, and prior to Alexander constructing his fish trap therein, on or over, was used by Barron

as a harbor and anchoring place, but that the utility of the same for this purpose has been entirely destroyed by the erection and maintaining of this fish trap. If any witness ever tried to explain that this place has not been destroyed as a harbor by reason of this obstruction their reasoning is manifestly wrong. And this can readily be ascertained by viewing the maps and plats that are conceded to be correct, and observing the manner in which the structure in question is erected and its relative position as to the upland and the spit that makes out near the westerly end of the same. In the face of these undisputed facts we do not see how it was possible for the trial court to arrive at the conclusion that it did and made the finding complained of.

From the foregoing state of undisputed facts the court then, should in our judgment, have granted the restraining order prayed for in the amended and supplemental complaint, the only feasible way to appellant's upland having been entirely cut off by the action of appellee. We further contend that under the law the appellant is entitled to free and unobstructed access from every foot and point of his upland or water frontage to the navigable waters of Chatham Straits and call the court's attention to

the following authorities which we believe support our contention:

"The owner of land bounded by navigable waters has a right of free communication between his premises and the navigable channel of the river. This riparian right of access is strictly the right of access to the front of the property and does not include the right of access to the sides of piers. The right of access does not depend upon the ownership of the lands between low water mark and the line of navigability, and is the same whether the land abuts on tidal or non-tidal water. *This right of access is property*, and while the right does not prevent the state from assuming jurisdiction and control over the bed and banks between high and low water marks, yet any act which makes the front of his land less accessible to the water is an injury for which an action for damages may be brought, except where the right has been obtained by eminent domain or the interference is the improvement of the navigation of the river by the state or regulation of commerce by congress. Where the riparian owner is deprived of such right of access, he may also enjoin the obstruction."

29th *Cyc.* 336E.

Citing: *Juneau Ferry Co. vs. Alaska S. S. Co.*, 1 Alaska, 533;

Sutter vs. Heckman, 1 Alaska, 81;

McCloskey vs. Pac. Coast Co., 160 Fed., 795;

Lewis et al. vs. Johnson, 76 Fed., 476.

This right of access is property.

22 *Cyc.*, p. 336E.

The court in the case of *Shirley vs. Bishop,* 8 Pac., 83, says:

"The free access to that 'public water highway' was a vested right and privilege that belonged to the plaintiffs, and of which they could not be deprived in the manner claimed as legal in this contention. * * * If the wharf of the defendants could be built, and was allowed to stand, it would preclude the plaintiffs from building any wharf as to *sixty feet of their water front* of said block of land, and this effect upon their land, in the absence of all compensation, would, if not prevented, result in injury grievous and irreparable, from which, as threatened, they should have relief."

"The owner of premises bounded by a navigable stream has, as a riparian proprietor, the right of access to the navigable part of the river in front of his premises, and the right to make a landing, dock, wharf or pier for his own use, or the use of the public; but such structure must not encroach upon navigable waters and vessels, and the commerce navigating the stream must not be impaired in their passage, or precluded from the use of all parts of the stream which are navigable in fact. *These rights are property,* and the riparian owner is entitled to compensation for their destruction or impairment."

Paine Lumber Co. vs. United States, 55 Fed., 855.

"Citizens of the United States claiming, in good faith, uplands in Alaska and in actual occupation and possession thereof, take the same littoral rights as are incident to ownership in fee.

Lewis vs. Johnson, 76 Fed., 476.

"Among these is the right of access over and across abutting tide lands to deep water."

Id., 476.

"Equity would interfere by injunction to prevent the *impairment* or *destruction of such right.*"

Id., 476.

"A littoral owner, while not entitled to wharf out on the tide lands in front of his property, is entitled to an injunction against the erection of any structure on such lands or in the water in front thereof, which would interfere with his right of access."

McCloskey vs. Pac. Coast Co., 160 Fed., 794.

"Under the common law the king was the owner of the bed of the ocean and of everything below the line of ordinary high tide, the littoral owner holding only to the line of ordinary high tide, with the right of access to the navigable waters in front of his land *and every part thereof*, though like a riparian proprietor he had a right to the water frontage belonging by nature to his land, a right distinct from the right of navigation."

Id., 794.

"The common law by Act of Congress, has been declared to be in force in the territory of Alaska."

Id., 794.

In the McCloskey case, *supra*, the court quotes with approval the following from *Gould on Waters*, Sec. 149, namely:

"A littoral proprietor like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water for the purpose of using the right of navigation. It is distinct from the public right of navigation, and an interruption of it is an encroachment upon private rights, whether caused by a public nuisance or authorized by the legislature."

The court further says in the McCloskey case that

"There can be no doubt, therefore, that the appellee, while it had not the right to wharf out on the tide lands in front of its property, was, if its land abutted the shore, entitled to free access to the navigable waters at *all points in front thereof*, and was entitled to an injunction against the erection of any structure on the tide lands, or in the waters in front thereof, which would interfere with such access."

Citing

Gould on Waters, Sec. 547;

Lyons vs. Fishmonger Co., 1 App. Cas., 662;

Shirley vs. Bishop, 67 Cal., 543;

San Francisco Sav. Union vs. Pgr. Petroleum Co., 27 Pac., 823.

"An owner of lands in Alaska, which border on tidal waters has no title to the soil below high water mark, and cannot enjoin the maintenance of a wharf or other structure *in aid of navigation thereon, unless it prevents his own free access to the navigable waters.*"

Decker vs. Pac. Coast S. S. Co., 164 Fed., 974.

"An equitable owner or claimant of government lands in Alaska on the sea shore *may convey his littoral right to an individual or corporation* to enable such grantee to erect and maintain a wharf for the benefit of *commerce and navigation.*"

Id., 974.

Morrow, C. J., in the opinion of above case refers to the case of *Columbia Canning Co. vs. Hampton,* 161 Fed., 64, in which last named case it was held:

"That the littoral right attached to plaintiff's homestead location entitled him to free access to the navigable waters of Lynn Canal, but not to build on the shore or to erect any structure reaching out to deep water, *so as to obstruct navigation.*"

In the Decker case, *supra,* the Appellate Court quotes from the Columbia Canning Company case as follows:

"He may have, however, a right of action against an intruder who places obstacles on the shore that prevent him from having access to the navigable waters."

And, continuing, the court further says in said Decker case that

"This is the general rule, and is designed to keep navigable waters free and open to the public for *commerce and navigation*, and at the same time permit the littoral owner and those engaged in

commerce and navigation to have access to navigable waters; but it cannot be ascertained from the allegations of the complaint in this case, nor does it appear in evidence, in what manner the maintenance of the buildings and wharf by the appellee in front of appellant's premises prevents her from having access to the navigable waters of Gastineau Channel. The presumption is that such access would be facilitated, rather than obstructed, by the maintenance of a wharf and other suitable structures for the accommodation of the public in the discharge and shipment of passengers and merchandise arriving and departing by water at the port of Juneau."

The case of *Columbia Canning Co. vs. Hampton*, 161 Fed., 60, was an action to restrain defendants from interfering with or obstructing the plaintiff in the use of a structure which he had commenced to erect for a fish trap at a point on St. Mary's Peninsula, on the north shore of Lynn Canal, a navigable arm of the North Pacific Ocean in Alaska. No question in case was involved concerning access to navigable waters.

And Morrow, C. J., in the opinion in said case, at pages 64 and 65, states as follows:

"It follows from these authorities that while the owner or locator of lands in Alaska which border upon navigable or tidal waters has, under the general law, the right of access to such waters for the purpose of navigation, he can acquire no right or title in the soil below high water mark, and he can have therefore no right of possession upon which he can base an action against an intruder

whom he charges with interfering with and obstructing him in the erection and use of a structure upon the shore below such high water mark. *He may have, however, a right of action against an intruder who places obstacles on the shore that prevent him from having access to the navigable waters; but that is not this case.*"

"Where a homestead entry in Alaska was bordered on one side by the meanders of the tide waters of Orca Inlet, the entryman, as the owner of the upland, though acquiring no title to the shore or soil below high-water mark, was entitled to free and unobstructed access to the navigable water, and for that purpose to construct a wharf over such land without interference by third persons claiming the right to use the shore."

Dalton vs. Hazlet, 182 Fed., 562.

In the above case, the plaintiff was the owner of the upland and had commenced the construction of a wharf directly in front of said upland. The defendants went upon the tide land in front of said wharf and plaintiff's upland and commenced driving piles, etc., and interfered with the access of plaintiff to the navigable water by means of said wharf.

Morrow, C. J., in the opinion in the foregoing case, on page 572, says:

"It is further contended that under the law of littoral ownership as it exists in the territory of Alaska the plaintiff has no cause of action against an occupant of tide flats in front of his upland. This contention is based upon the law of littoral

ownership in a territory as declared by the Supreme Court in *Shirley vs. Bowlby*, 152 U. S., 58, where the court said: 'Grants by Congress of portions of the public lands within a territory to settlers thereon though bordering on or bounded by navigable waters convey of their own force no title or right below high water mark, and do not impair the title and dominion of the future state when created, but leave the question of the use of the shores by the owners of upland to the sovereign control of each state, subject only to the rights vested by the Constitution of the United States.'

"But the plaintiff in the present case does not claim any right or title to the soil below high water mark; what he claims is free access to the navigable waters in front of his upland, which it appears is being obstructed by the defendant."

"The owners of uplands and shore line have a right to pass out over tide lands to deep water, subject to the rights of commerce and navigation."

Juneau Ferry Co. vs. Alaska S. S. Co., 1 Alaska, 533.

"The owner of upland bordering on the seashore in Alaska has the right of ingress and egress between his land and the sea over tide lands. Injunction will protect him in the exclusive enjoyment of his rights."

Sutter vs. Heckman, 1 Alaska, 82.

Wickersham, Judge, in his opinion in the case of *United States vs. Roth*, 2 Alaska, 257, on page 264, says:

"In this case it is conceded that the homestead claimant was in the actual occupation and possession of a part of the land described in his homestead

entry, and no prior adverse possession is alleged or shown by the stipulation. Upon the facts and the law, it must be held that he was also in constructive occupation and possession of the whole of the homestead described in his notice of location, as well as the whole of the shore land in the Chena River in front thereof. His occupation and possession of the abutting upland was an occupation and possession of the valuable property which he possessed in the shore lands below high-water mark."

"But whether the title of the owner of such lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among these rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public subject to such general rules and regulations as the legislature may see fit and proper to impose for the protection of the rights of the public, whatever those may be."

Yates vs. Milwaukee, 77 U. S., 497.

"The riparian right is property and is valuable and though it must be enjoyed in due subjection to the *rights of the public*, it cannot be arbitrarily or capriciously destroyed or *impaired. It is a right of which when once vested the owner can only be deprived in accordance with the established law* and if necessary that it may be taken for the *public good* upon due compensation."

Id., —.

From a perusal of the foregoing cases there is nothing to indicate that such access in any manner depends upon the extensiveness of the use to which

such upland is put, or that such access is limited to any particular part of the upland fronting on navigable waters; or that such access *merely* means to be able to reach any part of the upland as a whole. On the contrary some of the authorities cited clearly hold that the littoral proprietor is entitled to access from his upland to the navigable waters and from every front foot of his upland, and that he has a right to the water frontage belonging by nature to his land, etc., and such littoral owner is entitled to compensation for their *destruction or impairment.*

Shirley vs. Bishop, 8 Pac., *supra;*
Paine Lumber Co. vs. U. S., supra;
Lewis vs. Johnson, supra;
McCloskey vs. Pac. Coast Co., supra;
Gould on Waters, Sec. 149.

Some of the foregoing cases subject the exercise of such littoral right to the rights of the *public and commerce and navigation*, but we shall discuss this phase under the next heading.

III.

The court below erred in holding that under the evidence in the case the appellant had reasonable access to the navigable waters of Chatham Straits, and in further holding that, as against the rights of

the appellee, appellant is only entitled to reasonable access from his upland to the deep waters of said straits.

In considering the matters under the foregoing head we will make two sub-divisions thereof.

First. We contend, that, if the doctrine of reasonable access applies in this case, then Barron had not reasonable access to his upland from the navigable waters of Chatham Straits, by reason of Alexander's structure.

We contend that it has been shown by a great preponderance, if not by the uncontradicted evidence, that the only *reasonable*, feasible or practicable place for landing steamers or water craft has been entirely destroyed and cut off from Barron's upland by Alexander's structure. He admits that the sandy beach lying between his fish-trap and what would be the prolongation of the west end line of Survey 804 is the "*most natural*" place for the landing and the reaching of Barron's upland. Barron, Mason, Thornton and Carlson, all of the witnesses who are competent to testify on this subject, have testified to it. Reasoning from the evidence leads us to this inevitable conclusion. The maps and plats taken together in connection with the evi-

dence, absolutely demonstrate this fact.

It has been shown in this brief, both as a matter of fact and as a matter of law, that Barron initiated his rights to the upland and used the waters abutting thereon and in this little cove, for reaching his upland, and anchoring his vessels, long before Alexander ever made any claim whatsoever to his fish-trap location. It further appears that Barron used the ground and that part of the cove and water and waterfront that is cut off by Alexander's structure, for the purposes above indicated, long before Alexander initiated any claim of right to his fish-trap location. Is it possible then, that Alexander, who is a mere trespasser or an interloper, shall now come in and dictate to appellant as to what portion of his waterfront he shall use for the reaching of his upland and anchoring his vessels which he used in connection with his fishing business? If this matter of an outlet from the upland to deep water is a matter of choice, then we submit that Barron should have that choice, and had made it and selected his landing place, before Alexander ever appeared upon the scene; and it would appear manifestly unjust if now Alexander should dictate as to where and how Barron should reach his upland. If this doctrine of reasonable outlet applies, then we submit that Bar-

ron had the right to select his gateway, which he did, and this Alexander has unquestionably destroyed.

Taking into consideration that we have pretty thoroughly covered this phase of the case in the argument under our second division in this brief, we refrain from saying more.

Second. The trial court manifestly applied the wrong authorities to this case.

The cases which the court has cited in its opinion do not apply to the case. We know of no case that holds to this doctrine of reasonable access except in some instances where commerce and navigation, or the rights of the public in general, are concerned. Where a sovereign power, for instance, the state, owns or becomes the owner of tide lands in trust, or the United States or general government holds the tide lands in trust, which applies to the case at bar, and grants a right-of-way for any public purpose across tide lands to deep water, or wherever the way is being used for commerce and navigation, or the rights of the public in general are concerned, then the upland owner may be relegated to a reasonable outlet or reasonable access to deep water, or may be compelled to use his means of ingress and

egress in such a way that it would not interfere with commerce and navigation, or the rights of the public, or interference with any grant made by the sovereign power for the use or occupancy of either the tide lands or the water bordering on the upland.

We submit that the trial judge in arriving at his decision in this case has, in our opinion, made an application of cases involving commerce and navigation and the rights of the public in general, and that such cases have, in fact, no bearing upon this case.

We quote the following from the opinion of the trial judge in support of the above assertion, namely:

"Section 3 of an Act of Congress, entitled 'An Act for the protection and regulation of the fisheries of Alaska,' approved June 26, 1906, provides:

" 'That it shall be unlawful to erect any dam, barricade, fence, trap, fish-wheel or other fixed or stationary structure except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than 500 feet or within 500 yards of the mouth of any red salmon stream where the same is less than 500 feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce and Labor is hereby authorized and directed to have any and all such unlawful structures removed or destroyed.' "

Also, the following extract from the Decker case, *supra*, quoted in the opinion, viz.:

"This is the general rule and is designed to keep navigable waters free and open to the public for commerce and navigation and at the same time permit the littoral owner and those engaged in *commerce and navigation* to have access to navigable water; but it cannot be ascertained from the allegations in the complaint in this case, nor does it appear in evidence, in what manner the maintenance of the buildings and wharf by the appellee in front of appellant's premises prevents her from having access to the navigable waters of Gastineau Channel. The presumption is that such access would be facilitated rather than obstructed by the maintenance of wharf and other suitable structures for the accommodation of the public in the discharge and shipment of passengers and merchandise arriving and departing by water at the port of Juneau."

Evidently the judge of the trial court construed the word "commerce" as used by Judge Morrow in the *Decker* case, as synonymous with a private industrial enterprise. In other words, that the operation of the fish trap by the defendant comes under the definition of the word "*commerce.*" We do not agree, that Judge Morrow ever intended to convey such a meaning, for the reason that commerce and navigation are well defined in the law.

The word "commerce" embraces transportation by land and water and all the means and appliances necessarily employed in carrying it out.

Cuban S. S. Co. vs. Fitzpatrick, 66 Fed., 63;

Chicago & N. W. R. Co. vs. Fuller, 84 U. S., 560;

South Carolina vs. Georgia, 93 U. S., 4;

Hannibal & St. J. R. Co. vs. Husen, 95 U. S., 465.

Also see *Words and Phrases*, Vol. 2, p. 1292.

"From the adoption of the Constitution, the universal sense has been that the word 'commerce,' as used in that instrument, is to be construed as a generic term, comprehending navigation, or that a control over navigation is necessarily incidental to the power to regulate commerce."

Words and Phrases, Vol. 2, p. 1292.

Citing *Wilson vs. United States*, 30 Fed. Cas., 239.

We are satisfied that no such interpretation as evidently made by the trial judge can be properly applied to the words "commerce and navigation" as used by Judge Morrow in the *Decker* case, or as such words appear in any of the cases cited in the opinion in this brief, for it is too evident that the two words "commerce" and "navigation" are used interchangeably, and certainly mean *carrying on commerce by transportation.*

Surely, it cannot be said that the fishtrap of the defendant in front of the plaintiff's upland aids commerce and navigation, while on the other hand,

it might readily be held *to be an obstruction to commerce and navigation.*

We know of no law that holds that the owner of upland must so use his land as to necessitate access to navigable waters from every point thereof, excepting, only, where *commerce and navigation,* or the public generally, become a factor; and under such circumstances, probably, the upland owner might be restricted to such access from his upland to navigable waters co-extensive with such use.

But can a mere stranger place a structure in front of this upland, which does not aid access to the navigable waters therefrom, but cuts off, or limits, such access, and does not in any way aid commerce and navigation?

We fail to see upon what theory of the law the owner should be deprived of his littoral rights or the exercise of such rights to the full extent of his water frontage. For whose benefit is this littoral right of 552.64 feet fronted by the fish-trap in this case withdrawn or taken away from the owner of the upland? Is it to aid the public ingress and egress to and from the upland to navigable water or to permit a stranger, as distinct from the public, to carry on an enterprise which is clearly a hind-

rance to the public ingress and egress to and from the upland to navigable water?

In this connection we call attention to the fact that between every survey bordering on navigable waters in Alaska, excepting only mineral claims, a space of eighty rods is reserved by the Government. The purpose of this reservation is evidently to protect and preserve to the public access to the navigable waters, and by implication Congress has indicated or recognized the fact that in case of homestead entries the owner of the upland is entitled to his water frontage and the Government has reserved each alternate eighty rods and withholds it from entry in order to preserve *this water frontage* and prevent private owners from controlling it.

We think we have already covered this matter, and have nothing further to add, except that our contention is that the littoral right of the upland owner is absolute to every foot of the upland, subject only to the paramount right of the public for commerce and navigation, as commerce and navigation are defined in the law.

IV.

The court below erred in visiting and viewing the premises in controversy or the situs of the fish-

trap after the close of the case for the following reasons:

First. For the reason that the judge did so of his own free will and accord and not at the request or solicitation of either of the parties to the action, after there had been a change in the structure or fish-trap complained of in the amended and supplemental complaint; second, for the reason that the court misused and misapplied the information or knowledge thus gained to the prejudice of and in a way or manner that materially affected the substantial rights of appellant.

The court below erred in not granting the plaintiff below a new trial or rehearing upon the showing made.

It is conceded in this case that, after the trial had been finished, the argument of counsel made, and the cause submitted to the court for its decision, or for the entering of a decree, the court, of its own accord, visited the premises in controversy, or the situs of the fish-trap. The court states in its opinion that the lead line of the trap had been changed, "thus eliminating any possible question in the judgment of the court of its interfering with plaintiff's right of access from every point of his upland to the

navigable waters of Chatham Straits." In other words, when the court arrived at the premises he saw another fish-trap other than the one complained of in the amended and supplemental complaint. The order which the court made in overruling and denying the motion for a new trial or rehearing herein, which is set forth in this brief, and found at page 52 of the record shows that this changed condition of the fish-trap had great weight with the court in arriving at its final conclusions herein and the rendering of the decree. In that order the court states, "That the change made in the construction of the fish-trap by the said defendant does not cause the same to in any way interfere with plaintiff's free ingress from the navigable waters of Chatham Straits to his upland and all parts thereof or free egress from his upland and all parts thereof to the navigable waters of said Chatham Straits." Alexander destroyed the very evidence or object which the court visited to see. This destruction of this evidence, when Alexander knew that the court intended to visit the premises, is evidence against Alexander, showing that he believed the way his fish-trap was constructed as set forth and described in the amended complaint herein did obstruct Barron's free access to his upland.

"The presumption is that the contents of a written instrument were unfavorable to one who has deliberately destroyed it."

Tauton vs. Keller, 47 N. E., 376.

"The deliberate destruction of evidence * * * gives rise to an inference that the matter destroyed or mutilated is unfavorable to the spoliator."

16 *Cyc.*, 1059.

Now let us see what the object is in viewing premises either by court or jury.

"Ordinarily a court will not permit a view where there has been a change in the condition of the *locus*, though it may do so."

22 *Ency. Pl. & Pr.*, 1057.

Citing *Sell vs. Ernsberger*, 8 Ohio Cir Ct., 499, 4 Ohio Cir. Dec., 100, wherein it was held that in an action against a road supervisor for digging an uncovered trench on a highway, in front of the entrance to his building, it was error to allow the jury to view the premises, the condition of the trench having changed since it was dug.

"The view may be granted, although the condition of the property has changed since the time of the injury complained of, if the change is not material; but it should not be granted where it appears that material physical changes have occurred in the character of the premises between the time of the injury and the time of trial, * * *"

38 *Cyc.*, 1313 J.

In the case of *Holladay-Klotz Land and Lumber Company vs. T. J. Moss Tie Co.,* 79 Mo. App., 543, it was held error to allow plaintiff to show change in a suit begun before the change was made.

"The object of a view is not to furnish the jurors with evidence upon which to found their verdict, but to enable them better to understand and apply the evidence presented in court."

22 *Ency. Pl. & Pr.,* 1054,

Citing *Wright vs. Carpenter,* 50 Cal., 556;
Groundwater vs. Washington, 92 Wis., 56.

"Accordingly the jurors cannot use the result of their examination on a view as independent evidence in the case, though they may take it into consideration in connection with the evidence introduced at the trial."

22 *Ency. Pl. & Pr.,* 1055.

"As a rule a view by the jury is ordered only in cases where the facts involved are such that they cannot be accurately described to the jury, and where such view will better enable the jury to understand and apply the evidence."

22 *Ency. Pl. & Pr.,* 1055.

"The deliberate destruction of evidence * * * gives rise to an inference that the matter destroyed or mutilated is unfavorable to the spoliator."

16 *Cyc.,* 1059.

The foregoing citations refer apparently to jury cases. However, in the trial of equity causes the

judge acts in a dual capacity of court and jury—judge of both law and fact. While acting as judge of fact he is human and apt to err. He arrives at conclusions of fact the same as a jury, and in doing so is governed by the same principles as a jury, and moved by the same impulses and motives. What would affect an enlightened juror will affect a judge. Hence we believe the trial judge, in arriving at his findings of fact, and in the rendition of the decree herein, misconceived the object of his visit to the premises in controversy and *locus* of the fish-trap. In the language of the decision, "The object of a view is not to furnish the jurors (the judge in this case) with evidence upon which to found a verdict (in our case, the making of findings of fact), but to enable them (the judge) better to understand and *apply the evidence presented in court.*"

Supra, 22 *Ency. Pl. & Pr.*
Wright vs. Carpenter;
Groundwater vs. Washington.

Nor can the court use the result of the examination and a view of the premises as independent evidence in the case.

Supra, 22 *Ency. Pl. & Pr.*

Surely, in this case, where the physical conditions existing upon the ground and over the water,

as set forth in the pleadings and the evidence and testimony introduced, had been entirely changed and destroyed, when the judge reached the premises, there was nothing upon which *a view* of the premises or *locus* of the fish-trap could be predicated. The condition of the fish-trap as changed was not an issue in the case tried. And this changed condition had great weight with the judge, for he refers to it both in his opinion and in the order overruling the motion for a new trial and rehearing. The court used knowledge and information thus gained by his visit for a purpose that is in direct opposition to the law. Barron has not had his day in court on these changed conditions and has not had an opportunity to show whether or not these changed conditions interfere with his free ingress to the upland and free egress therefrom to navigable waters. We contend that navigation is a science. As to what constitutes free and unobstructed, or *even reasonable*, ingress to or egress from, Barron's upland to navigable waters of Chatham Straits, is a matter of proof; and such proof should be made by the testimony of expert witnesses, or persons who have had experience in navigation of water crafts, the tying up and anchoring of the same, and so forth. The court in the case at bar, while it could act in a dual capacity, being both judge of law and fact in the case, could

not by its own judgment supply the facts. How does he know that the changed condition "eliminates any question of free access to the waters of Chatham Straits or free ingress from the waters to this upland?" How is the appellate court going to determine this fact when there is not a scintilla of evidence or proof on this phase of the case. It might be a happy condition of affairs if, under the Constitution and our institutions, and in the administration of justice and trial of cases the taking of evidence could be dispensed with, but as yet we have not reached that stage of perfection in the trial of causes. The action of the court in this matter was made the grounds of a motion for new trial or rehearing, and has been preserved as one of the errors in the case. We submit, however, that upon the great preponderance of the evidence, if not upon the uncontradicted facts in this case, the relief prayed for in the amended and supplemental complaint should have been granted, and we believe that this Honorable Court will concur in this, and will give unto the appellant that which he has prayed for.

Very respectfully submitted,

JNO. R. WINN and
N. L. BURTON,
Attorneys for Appellant.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2171.

JAMES T. BARRON,

Appellant,

vs.

CLAIRE J. ALEXANDER,

Appellee.

BRIEF OF APPELLEE.

Upon Appeal from the District Court for the District of Alaska, Division No. One.

STATEMENT OF FACTS.

The undisputed facts, as shown by the evidence in this case, are substantially as follows:

That James T. Barron, the appellant, claimed to be the owner and in possession of a tract of land, consisting of 5.27 acres, located on the south shore of Admiralty Island, in the Territory of Alaska, known as Survey No. 804–B; that said land has a frontage on Chatham Straits, an arm of the Pacific Ocean, of approximately 800 feet. That in the spring of 1911, appellee commenced the construction of a fish-trap in the waters of Chatham Straits, opposite and in front of said tract of land, and completed the same prior to the trial of this suit; that said fish-trap, as located and driven by appellee, was entirely below the line of extreme low tide and in the navigable water of Chatham Straits. That said tract of land was a barren waste covered by forest and boulders and was wholly unimproved, with the

exception of a so-called cabin without roof, floor, window or door. (See Photograph, Defts. Ex. 10, P. R., 582.) That Claire J. Alexander, the appellee, is a citizen of the United States over the age of twenty-one years and a resident and inhabitant of the Territory of Alaska; that appellee fished said trap during the season of 1911, making a profit thereby of $10,000, and the cost of construction of said trap was $6,000; that said fish-trap was not located within 1800 feet of any other fish-trap in that vicinity.

The only material question in dispute in this case is as to whether or not appellee's fish-trap obstructs appellant's right of access, over the tide lands, from the navigable waters of Chatham Straits to his upland; or, in other words, his right of ingress and egress over said tide lands to and from his upland. In this question is included also the controversy, as shown by the evidence, with reference to the location of the trap, the contour of the shore land, the feasibility of building a wharf, the depth of the water, and the purposes for which appellant intended to use his upland. Upon these disputed questions of fact, the trial court made its findings. Finding of Fact III (P. R., 50) covers the questions in dispute between the parties litigant. Said finding is as follows:

> "That defendant's fish-trap does not in any manner interfere with the free ingress and egress to and from the premises hereinbefore described to the deep water of Chatham Straits, nor from any part of said premises to said deep

water of said Chatham Straits; that the operation of said fish-trap will not obstruct or interfere with the free ingress to or egress from the land hereinbefore described; and that none of the acts of the defendant with reference to the construction, maintenance or operation of said fish-trap have or will obstruct or interfere with the plaintiff in the exercise of his right to free and unobstructed access to his land and every part thereof from the deep waters of Chatham Straits or from his land, as hereinbefore described, to the navigable waters of said Chatham Straits."

Chapter 39, section 372, of the Alaska Code of Civil Procedure, relating to questions of an equitable nature, reads as follows:

"All issues of fact in actions of an equitable nature may be tried by the Court, and if tried by the Court, the evidence shall be presented and the trial conducted in the same manner as other actions: *Provided,* The Court may, in its discretion, refer the case to a referee pursuant to the provisions of this title. In all such actions the Court, in rendering its decisions therein, shall set out in writing its findings of fact upon all the material issues of fact presented by the pleadings, together with its conclusions of law thereon; but such findings of fact and conclusions of law shall be separate from the judgment, and shall be filed with the clerk, and shall be incorporated in, and constitute a part

of the judgment roll of the case; and such findings of fact shall have the same force and effect, and be equally conclusive, as the verdict of a jury in an action. Exceptions may be taken during the trial to the ruling of the Court, and also to its findings of fact, and a statement of such exceptions prepared and settled as in an action, and the same shall be filed with the clerk within ten days from the entering of the decree, or such further time as the Court may allow."

ARGUMENT.

I submit, as a proposition of law, that this Court will not reverse the findings of fact made by the trial court in this case, unless

(1) Some serious or important mistake has been made in the consideration of the evidence; or

(2) An obvious error has intervened in the application of the law.

Cook vs. Robinson, 194 Fed. 753 (Alaska);

Thorndyke et al. vs. Perseverance Mining Co., 164 Fed. 657 (Alaska);

North American Exploration Co. vs. Adams, 104 Fed. 404;

Coder vs. Arts, 152 Fed. 943;

Stewart vs. Hayden, 72 Fed. 402;

Paxton vs. Brown, 61 Fed. 874;

Warren vs. Burt, 58 Fed. 101;

DeLaval Separator Co. vs. Iowa Dairy Separator Co., 194 U. S. 423;

Tilghman vs. Procter, 125 U. S. 136;

Stanley vs. Board of Supervisors, 121 U. S. 535;

Dooley vs. Pease, 180 U. S. 126;
Lehnen vs. Dickson, 148 U. S. 71;
Kimberly vs. Arms, 129 U. S. 512;
Hathaway vs. First National Bank of Cambridge, 134 U. S. 494;
Furrer vs. Ferris, 145 U. S. 132;
Rust et al. vs. Strickland, 28 Pac. 141.

Does the record show that the trial court made any serious or important mistake in the consideration of the evidence? The appellant testified that defendant's fish-trap did obstruct the entrance from Chatham Straits to his upland; that it was absolutely impossible for a fishing boat to go in between the trap and the point marked "bare rock" (Pltf's Ex. D.); that the spot described as a sandy beach on the west end of the claim was the only feasible landing-place upon the shore; that the feasible place to build a wharf from appellant's upland was on the west end of the claim; that he intended, if successful in this suit, to use the premises as a fishing station and to build a fish-trap in identically the same place where appellee's trap is located. (P. R. 257, 277, 279, 285 and 289.) He also testified that if he prevails in this suit he intends to use his premises for the purpose of building a wharf there (P. R. 291) and repeats the same statement (P. R. 296). He also testified that if successful in this suit, he intends to convert the fish-trap site into a place to store combustibles, such as naphtha and gasoline. (P. R. 301.)

Ed. Thornton, a witness for appellant, also testi-

fied that the fish-trap obstructs appellant's access to his upland, that it was a menace to navigation, and that it was impossible to navigate a boat between the trap and the point marked "bare rock" on Plaintiff's Exhibit "D." (P. R. 416–436.)

Charles Carlson, a witness for the appellant, corroborated the testimony of Captain Thornton. (P. R. 437–448.)

P. H. Mason, a witness for appellant, testified as follows (P. R. 369):

> "Q. (By Mr. WINN.) I will ask you, Captain, as to whether or not this trap, then, as it is now constructed, would obstruct the ingress and egress into and from this upland over this route that you have just described?
>
> "A. This trap, as it stands—the situation is now—absolutely obstructs the whole harbor.
>
> "Q. And when you say the whole harbor, do you mean the whole frontage of Barron's claim?
>
> "A. The whole frontage of Barron's claim. The frontage of this bare rock here, as you have termed it."

Appellant also introduced a map (Pltf's Ex. "D," P. R. 164) from which Mr. Lloyd Hill testified as to the location of the uplands, trap, depth of water, and various objects shown on said map. All the witnesses for the appellant testified that the only feasible place to build a wharf from the upland, extending to deep water of Chatham Straits, was on the west side of Survey No. 804, and that if such wharf were constructed it would intersect with appellee's fish-trap.

The testimony of appellant's witnesses, taken in connection with Plaintiff's Exhibit "D" (P. R. 164), shows that Alexander's trap is located entirely in the navigable water of Chatham Straits. It shows that there are eight feet of water at low tide at the pile in the lead of said trap, nearest the shore, and that the outside or face of the trap stands in over 40 feet of water. There is a line of soundings, shown on Plaintiff's Exhibit "D," running from near the bare rock to the lead pile showing: 21′ 21′ 18′ 18′ 16′ 12′ 10′. It also shows that it is 140 feet from the nearest pile in the trap toward the shore, to the line of low tide. (Pltf's Ex. "D," P. R. 164.) Mr. Hill testified that these soundings were made by him about one o'clock P. M., March 11th, 1912, less than one hour before low tide, and he based his figures on the lowest tides of that month (P. R. 171); and appellant's witness, Captain Thornton, testified that these soundings taken an hour before low tide would not make more than six inches difference (P. R. 435); therefore, there would be 7½ feet of navigable water at the lead pile nearest inshore at the extreme low tide for the month of March, 1912.

Now, taking the testimony of Mr. Birkinbine, the witness for the appellee, showing that the rise of the tide is 23.09 feet, and adding one-half of this number, or 11.545 feet, to the 7.50 feet, we find that during the month of March, 1912, the actual average depth of water at the lead pile nearest the shore of appellee's fish-trap, was 19.045 feet, and that during June, 1912, it was 15 feet. (See testimony of H. P. N. Birkinbine, P. R. 609.)

The undisputed testimony of all the witnesses shows that the water is much deeper on the east side of the trap than on the west side of the trap. (See testimony of P. H. Mason, P. R. 384.) Fifteen feet of water is navigable water for all kinds of craft ordinarily used by fishermen and cannery-men in Alaska.

Plaintiff's Exhibit "D," as well as Defendant's Exhibit 4, directly contradicts the oral testimony of appellant and his witnesses upon the question of access to the uplands. The photographs, Defendant's Exhibits 5 and 6 (P. R. 570 and 575), contradict the testimony of the plaintiff upon this point. Exhibit 5 conclusively shows that the land is low and flat on the east end of appellant's claim and that the uplands are accessible from the water at this point. Mr. Birkinbine further testifies that all parts of Survey 804 are accessible from the place where Defendant's Exhibit 5 was taken; that he walked along the entire length of the claim from this point, carrying his surveying instrument with him. (P. R. 565.) Mr. Birkinbine's testimony also shows that it is 421 feet from the bare rock to the nearest pile of defendant's trap. (P. R. 559.) Even a hasty perusal of the evidence shows that no serious or important mistake was made by the trial court in the consideration of the evidence in this case. Certainly, there is some evidence upon which the trial court based these findings of fact.

In the decision in the case of Rust et al. vs. Strickland, Judge Reed says:

"The only other question presented for review is the sufficiency of the evidence to sustain the decree. The testimony is very voluminous, and, upon some important points, conflicting and contradictory. We have examined it very carefully, and conclude that the decree must be affirmed. It is not enough that this Court should differ in judgment from the Court below as to the preponderance of evidence upon reading the transcript, nor that, upon such reading, it would be inclined to enter a different decree. The witnesses are personally before the trial court, which has far greater opportunity of justly determining their credibility than this Court can have. We can only reverse when—First, there is an absolute want of evidence to sustain the decree; second, when the decree is so manifestly against the weight of evidence as to show it to be the result of bias or prejudice. This rule has been so often asserted in both the Supreme Court and in this court that citations of the different decisions are wholly unnecessary. This case does not come within either of the above exceptions to the rule. It might seem to a court of review that upon some questions the decree was against the weight of the evidence, but it cannot be said to be without testimony to support it. In cases of this kind where the evidence is not only conflicting, but the statements of witnesses diametrically opposed, the result must depend in a great measure upon the credit given the witnesses respectively. This

> Court has no opportunity to judge individual credibility. These being the only questions for review, the judgment of the District Court must be affirmed."
>
> Rust et al. vs. Strickland, 28 Pac. 142.

Has an obvious error intervened in the application of the law by the lower court? Counsel for appellant, in their brief, cite a number of cases in support of their theory of the law applicable to the facts and incorporate brief excerpts from the decisions to which they refer. I will briefly consider these cases:

> Juneau Ferry Company vs. Alaska Steamship Company, 1 Alaska, 535; Id., 125 Fed. 356.

The question considered there referred solely to the right of the defendant to wharf out. The lower Court held that the owner of uplands has no title to tide lands in Alaska but has a right to pass out over the tide lands to deep water. Upon appeal, however, it was held that no question of littoral rights was involved in the case.

> McCloskey vs. Pacific Coast Co., 160 Fed. 794.

Defendant was attempting to erect a building *on the tide lands* in front of plaintiff. The Court says:

> "But notwithstanding that the theory upon which the Court below awarded this injunction may have been erroneous, the injunction must not be disturbed if from the pleadings and the proofs we may discover any tenable ground upon which it may be sustained. We find such ground in the fact shown by the bill and in the proofs that the appellee's grantors, at the date

when the Act of Congress of May 17, 1884, was enacted, claimed the possession and the right of possession of all the tide lands in front of their property, and have ever since maintained such claim except so far as they have conceded the public use of the street and sidewalk."

To the same effect is the case of Heckman vs. Sutter, 119 Fed. 83; Id., 128 Fed. 393.

The decision of the lower Court was affirmed, but such affirmation was based entirely upon a different theory than the one held by the Court below, viz., for the reason that the plaintiff and other grantors had held possession of the premises ever since and prior to the Act of May 17, 1884 (23 Stat. at L. 24).

The foregoing cases do not seem to be applicable to the case at bar, for the reason: First, that in the case at bar no claim is made by appellant of any title under the Act of May 17, 1884; and second, that in the foregoing cases the Court was dealing with a trespass actually committed upon the tide land between ordinary high and low tide, while here we are dealing with a structure located out beyond even extreme low tide, in the navigable water, which structure cannot, in the very nature of things, prevent appellant's access over the tide lands to his uplands. In going to his upland, appellant does not begin his passage over the tide lands until after he has passed a distance of more than 140 feet beyond the fish-trap. (See Deft's Ex. 4, distance from lead pile to ordinary low tide.)

The gist of the decision in the case of

Lewis vs. Johnson, 76 Fed. 476,

is to the effect that a person in possession of upland,

without title in fee simple, has the same littoral rights as an owner in fee simple, viz., a right of access to navigable water.

In the case of

Dalton vs. Hazlett, 182 Fed. 561,

the Bill of Exceptions was not made a part of the record, and the Court held that the substantial merits of the case could only be considered on appeal as shown by the pleadings, findings of fact, conclusions of law, and the decree. The facts found by the lower Court were briefly these: Hazlett applied for an injunction to restrain Dalton et al. from constructing and maintaining a wharf on the tide lands in front of plaintiff's wharf and upland on the waterfront of the town of Cordova, Alaska. That on June 10, 1908, plaintiff commenced the construction of a dock or wharf upon the land owned by him in fee, above the line of mean high tide, with the intention of continuing same over the tide lands lying immediately in front of and abutting upon his upland, to deep water. Defendant entered upon the tide land immediately in front of plaintiff's wharf, and for the purpose of hindering and preventing plaintiff from continuing his wharf to deep water, and commenced driving piles and covered a place 68 feet wide by 130 feet long. The tract of land occupied by defendant was between the line of mean high and low tide, and was directly in front of the wharf being constructed by plaintiff, and was between the land owned by plaintiff and deep water, and was so constructed as to prevent plaintiff from completing

his said wharf to deep water; that defendant's structure prevented plaintiff, and the public generally, from landing boats or barges of light draft at the outer edge of this wharf; that plaintiff's wharf was a public necessity, being necessary to the inhabitants of the town for the purpose of bringing in lumber, material and supplies. The Appellate Court affirmed the decree granting an injunction. The case, as considered in the Appellate Court, was exactly the reverse of the case at bar, because there the lower Court found as a fact that the defendant's structure *did interfere* with and actually cut off plaintiff's access to his upland; while here, the Court has found as a fact that the appellee's fish-trap *does not* interfere with nor cut off appellant's access to his uplands, and furthermore, there defendant's structure was actually on and in the tide land, while here, appellee's structure is far below tide land and in the navigable waters of the ocean. Appellant's right of access to navigable water means his right to reach water capable of navigation by such craft as he might need in the carrying on of his business. The testimony shows that the only boats used in the fish business, outside of the fishermen's small boats, are the gasoline boats, and that the largest one of these owned by appellant does not draw more than 8 feet of water. Appellant's own witness, Mr. Hill, testifies that there was approximately 8 feet of water at extreme low tide at the lead pile in appellee's fish-trap in March, 1912, or, as I have shown on page 7 of this brief, there is over 19 feet of water at the lead pile at average sea level. Can it be said

that appellant, in going over the tide lands from his uplands to the navigable water, has not reached navigable water when he arrives at the lead pile of appellee's trap?

In Decker vs. Pacific Coast Co., 164 Fed. 974, it did not appear from the record that plaintiff was prevented by defendant from having free access to navigable water, and for that reason the action of the District Court in refusing the injunction upon this and other grounds was affirmed. The Court, in effect, held that the mere fact that defendant erected buildings on the tide land, in front of plaintiff's upland, did not entitle plaintiff to an injunction unless it was further shown that plaintiff's access to navigable water was thereby cut off.

Replying to the contention of the learned counsel for the appellant, that the question of access to appellant's upland must be considered with reference to the space of navigable water included within the end lines of Survey 804, prolongated indefinitely into the waters of Chatham Straits, as appears from Plaintiff's Exhibit "D," and that in computing the area of navigable water in front of the upland, the distance must be measured between appellee's trap and these imaginary lines: I suggest that counsel's position is unique in the history of the law concerning littoral rights. However, their ingenuity may be commendable, in the prolongation of these imaginary lines, in order to support a theory never before advocated by lawyers. But why stop in the middle of Chatham Straits? Counsel gives no explanation in the brief.

The sea, from time immemorial, has been a public highway open to all the world for commerce, navigation and fishery. There are no lines laid down in the trackless waste of the ocean at all analogous to the boundaries of tracts of land bordering thereon. If appellant ever should have occasion to enter upon this barren waste of worthless land included in Survey 804, from the waters of Chatham Straits, his right of access will not depend upon the direction his vessel runs. He may reach this land from the southeast, the southwest or the south. If, however, the land adjoining him should at some future time be taken up and occupied by others, it will then be soon enough to have his rights in the shore land established and determined by a court of equity.

Martin vs. Heckman, 1 Alaska, 165;
Hedges vs. West Shore Ry. Co., 44 N. E. Rep. 693.
See Statement by Judge Lyons (P. R. 236).

With reference to the visit of the trial Judge to the *locus in quo,* it is a matter of regret that counsel in their brief have seen fit to compare the learned, painstaking trial Judge to an ordinary jury of twelve laymen. Judge Lyons undertook the long, tedious journey to view the premises, not only for the purpose of elucidating the testimony of the witnesses and the other evidence in the case, but also out of abundant caution, that he might make no mistake in the exercise of his extraordinary power of injunction. Neither counsel for the appellant nor counsel for the appellee made any objection to the course pursued

by the trial Court. The order of the trial Court overruling appellant's motion for a new trial (P. R. 52), in which order it is stated that "The change made in the construction of the fish-trap by the said defendant does not cause same to in any wise interfere with plaintiff's free ingress from the navigable water of Chatham Straits to his upland or to any part thereof, or free egress from his upland and all parts thereof to the navigable waters of Chatham Straits," is a sufficient answer to the *ex parte* affidavit filed by one of the counsel without notice to appellee or his attorneys, and without service thereof being made upon anyone.

The above statement by the trial Court does not indicate, as claimed by counsel for appellant, that the Court based its finding of fact No. III upon the condition of the trap at the time he viewed the premises, but it was made for the purpose of refuting the statement made by Jno. R. Winn in his *ex parte* affidavit, signed July 2, 1912, wherein the affiant says that Alexander "was engaged in constructing another fish-trap *immediately in front* of the shore land and upland of plaintiff." (See P. R. 719; also affidavit of Z. R. Cheney in support of motion to strike Winn's affidavit, filed in this court October 24th.)

It is a well-known fact that nearly all the fish-traps in Alaskan waters are carried away by the action of the water during the winter months and that all such traps must be either partially or entirely reconstructed in the spring.

After the trial of the case, the appellee did change

the lead of his trap, extending it in a northwesterly direction toward Corner No. 1 of appellant's Survey 804. (See opinion, P. R. 742.) But he left the old lead where it was, intact, until it was viewed by the trial Court. This was not done by appellee with any intention of affecting the trial of the case, but because it made a better fish-trap. The reasons for the change being made do not appear in the record, because counsel for appellant neglected to serve his affidavit, shown on page 718 of the printed record. (See proof of service of motion for new trial, P. R. 717.)

However, from a perusal of the testimony upon cross-examination of P. H. Mason (found on page 397 of the Printed Record), it does appear, at least by inference, that the appellee at the time of the trial contemplated changing the lead of the trap from the way it was then driven to the position in which the Court saw it at the time of his visit to the premises. The testimony is as follows:

> "Q. Suppose that trap, instead of the lead line being the way it is, suppose the lead line over this way?
>
> "A. I think it would be useless.
>
> "Q. Well, I am not asking about whether you think it would be useless or not. I am asking you whether that would be a menace to navigation if that line instead of running the way it does now, ran over so it was tied to a post at a point, tied to the upland at a point to the west of survey number 804, would that be a menace to navigation then?

"A. No, sir.

"Q. Wouldn't be a menace to navigation?

"A. No, because anybody can go between the trap and the land and you would have plenty of water to the right, but I don't think anyone will ever run a lead that way.

"Q. You think that that lead has got to be just in that fix, in that direction and that angle approximately in order for a trap there to be of any use whatever?

"A. To make a fish-trap out of it."

That the change contemplated by the appellee was made in accordance with the questions put to Mr. Mason on the trial, is shown by the words found in the opinion of the trial Court at page 742 of the Printed Record:

"Since the hearing of this trial, however, the Judge of this court, in company with counsel for both the plaintiff and the defendant, has had an opportunity to visit the situs of the fish-trap and the tract of land described in plaintiff's complaint, and it appears that the lead line of the defendant's trap has been changed, so that instead of running in a northeasterly direction from the main part of the trap, as indicated by the exhibits offered in evidence, it now extends in a direction a little west of north from the trap, thus eliminating any possible question in the judgment of the Court of its interfering with plaintiff's right of access from every point of his upland to the navigable waters of Chatham Straits."

In view of the fact that counsel for appellant have used so much space in their valuable brief in commenting upon the good faith of the appellee, I may be pardoned if I call attention to the testimony of the appellant, Mr. James T. Barron, as bearing not only upon *his* good faith but also upon his credibility as a witness. Appellant is seeking in this suit a peremptory injunction against appellee, which, if granted, means the loss of a valuable structure which cost the appellee $6,000 in cash and which yields him $10,000 each season. On March 22, 1911, appellant filed his bill, in which no mention is made of his intention of building a wharf from his uplands. (P. R. 4.) On March 27, 1911, while in the midst of the first trial, Mr. Burton, realizing that he could not make out a case without some new theory to work on, had Mr. Fred Barker wire appellant as follows:

"Juneau, Alaska, Mar. 27, 1911.

"J. T. Barron,
Wells Fargo Bldg.,
Portland, Org.

"Burton asks that you wire fully that it is your intention at once to build and construct wharf from upland embraced survey 804, Alaska, out and into deep and navigable waters Chatham Straits for access from said upland to and into navigable water and that you are sending affidavit to this effect.

"FRED BARKER. 8:08 P. M."

Appellant obediently replied as follows:

"Portland, Ore., Mar. 28, 1911.

"To Newark L. Burton, Atty. at Law,
Juneau, Alaska.

"It is my intention to construct at once wharf from upland embraced survey eight hundred four Alaska out and into deep and navigable water Chatham Straits for access from said upland to and into navigable waters. Am sending by mail affidavit to this effect.

"JAS. T. BARRON."

Then on the second trial, March 18, 1912, Mr. Barron takes the stand in his own behalf, and in cross-examination testified as follows:

(P. R. 257.) "Q. (By Mr. JENNINGS.) Well, all right, if you don't understand. What did you get this upland for, Mr. Barron?

"A. I got it for a fish station and a mooring ground and to use—anything in our line of business.

"Q. What do you mean by fish station? You didn't expect to put a cannery on there.

"A. No, to use it for a fish-trap.

(P. R. 277.) "Q. (By Mr. CHENEY.) Mr. Barker wired you. That was for the purpose of protecting your property?

"A. Yes, sir.

"Q. You had no cannery buildings on this location at that time?

"A. No; it was my intention—

"Q. Just answer the question. You had no buildings on the place at that time?

"A. No.

"Q. And you weren't using it for any purpose in connection with the cannery?

"A. No; I intended using it for that purpose.

"Q. And I say at that time there was nothing on the property at all but a little bit of a shack?

"A. Yes; intended to use it as a fishing station.

(P. R. 279.) "Q. (By the COURT.) And I further understand you to say that it was about the only place within that cove where a trap could be constructed?

"A. That is what I have been told by several people who had the building of the trap there; also my own men who had made soundings there.

"Q. You think the trap is built in a workmanlike manner, do you?

"A. I think so; yes.

"Q. Now, if you should prevail in this suit you would build your trap in the same place?

"A. I suppose if going to build a trap there, have to put it there, because no other place.

"Q. Now, if you had a trap there, wouldn't it be just as difficult for you to get in to the upland as if another man had it?

"A. I suppose it would. The question would be with me whether it would be better for me to have a trap there or use it for a mooring grounds.

"Q. For a mooring grounds. Now, what is the purpose of your acquisition of this upland? Isn't it for the purpose of acquiring that up-

land in order to command the property in front of it for the purpose of a trap? Isn't that the sum and substance of this controversy?

"A. That is probable, outside the mere fact that I am able, you know, to use it for any purpose I wish.

"Q. Yes; but I understood you to say that prior to the acquisition of this land from Robertson that you intended to locate this very place as a trap-site yourself?

"A. But that was before Alexander had built his trap. I didn't know where the particular place was; whether could build at any other place or not; but it is evident from what I have heard that is the only place where it would be practicable to build a trap—just where the Alaska Packers were and where they are now.

(P. R. 288.) "Q. Well, now, just answer my question. If your counsel hadn't advised you it was necessary to protect your property that you build a wharf, you wouldn't have thought of building any wharf out there, would you?

"A. Possibly not that quickly or at the present time.

(P. R. 289.) "Q. Yes, you may have needed the wharf if you had put a cannery there and a lot of other things there; of course, have to have a wharf to get in, but you didn't intend to build a cannery there then—you had no intention to build a cannery?

"A. No; I had no intention of building a cannery, but I wanted a fish station there.

(P. R. 291.) "Q. If this Court gives you this property, are you going to build a wharf out there or a fish-trap?

"A. I will build a wharf out there.

(P. R. 300–1.) "Q. (By Mr. JENNINGS.) That is what you are going to do with this five acres of land you have got there instead of building a fish-trap?

"A. I don't know that I would. Then, I can, of course, do what I wish with the upland and I think I will build a wharf there.

"Q. You think you will build one?

"A. Well, I will qualify that. I will say I am going to build a wharf there.

"Q. Now, you are going to build one?

"A. Yes.

"Q. You are not going to have a fish-trap there at all? A. No, not this year.

"Q. And you are just going to convert that into a place to store combustibles and abandon the fish-trap idea all together? A. Yes.

(P. R. 307.) "Q. But I say it would be ten miles out of the way if you were coming around this way to Juneau?

"A. Well, Mr. Cheney, you don't understand me for you don't know anything about the cannery business. I have got propositions—I have got to have a line of traps below Hawk Inlet.

"Q. Well, you haven't got any below Hawk Inlet?

"A. That wouldn't make what I have in the future. I was out 20,000 cases last year on ac-

count of this jumping proposition—I outfitted for that."

The foregoing testimony alone is sufficient to raise a doubt in the mind of any Court, not only as to the good faith of the appellant but also as to his credibility. But when we consider that the trial Court, after noting the demeanor of the witness all through the trial, makes the statement found in its opinion (P. R. 728), to the effect that the principal object of the plaintiff is securing title to the tract of land described in the complaint was to enable him to control the fishing site in front of his upland, such statement removes all doubt of the fact that the sole object and purpose of appellant in this suit is to secure the trap-site for his own use and benefit. The statement referred to above is as follows:

> "It is true, as the plaintiff says, he may be able to use, and probably can use, such upland for other purposes, but it is apparent from the plaintiff's own testimony that his main purpose in securing title to such property was to enable him to hold the frontage for the purpose of erecting a fish-trap and enjoying the sole right to fish by any stationary appliance between his upland and deep water navigation. However the pleadings in this case may differ from the pleadings in the Hampton case, it is obvious that the object of both suits is the same, to wit, to enable the plaintiff to enjoy exclusive fishing rights in front of his upland holdings."

Upon the question of the good faith of party seeking an injunction, see

McCarthy vs. Bunker Hill & Sullivan Mining Co., 147 Fed. 981,

where on the middle of page 983, District Judge Beatty says:

> "A man must have some reason for his belief before asserting it as a truth. It seems by some to be considered admissible practice in litigation to assert anything, regardless of the truth, that will constitute a non-demurrable case. It is a duty that counsel owe to the courts to see that their clients present to them only the truth. Courts will endeavor to see that no man shall succeed through misrepresentation. It must be concluded either that these complainants intended to deceive the Court or were themselves deceived by their own culpable negligence. In either event a court of equity would not be justified in granting the relief they ask."

As bearing upon the question of knowledge gained from a personal examination and inspection of the premises by the chancellor, I quote from same opinion on the page following:

> "Since the former hearing over 1,400 pages of testimony have been taken, which with the oral arguments and the carefully prepared and able briefs of counsel were, at the last term of court, submitted for consideration. After examination of the same, a different conclusion from that before reached would not be justified.

> Even if this testimony could be held as changing the former testimony by affidavits, I know from my personal examination, made at the request of both parties as stated, what the facts are as to the real damage or injury, so far as disclosed by inspection of the premises. It is admitted that, for the preservation of possible rights, Courts may grant temporary restraining orders upon testimony which is not convincing, but they will not grant a permanent injunction, except on the clear establishment of those facts which justify it. It is not necessary to here review the testimony, but it is held insufficient to establish the alleged injury to complainants or to authorize the injunction asked."

I would be content to close this brief here were it not for the fact that upon the oral argument before this Court on October 25th and also in an amended and supplemental brief served upon me on that date, counsel for appellant have raised and argued another and entirely new question: a question neither mentioned in the pleadings nor argued in the lower court.

On page 30 of said amended and supplemental brief, counsel quotes the statute of June 26, 1906, being an act passed for the protection and regulation of the fisheries of Alaska, and on the page following, counsel says:

> "We contend that congress, by the passage of the act in question, recognized the right of parties to fish in Alaskan waters by means of fish-traps, and so forth, and furnished a protection

to anyone who has commenced the construction of a fish-trap or initiated a right to a fishing-trap location, and the force and effect of the statute or act in question is tantamount to granting the privilege of building and constructing fish-traps in the waters of Alaska, and that any person who has initiated the right to a fish-trap location or commenced the construction of a fish-trap, if prior in time, will be prior in right. The appellant in the case before the Court was prior in time, by reason of having purchased the location in question from the A. P. A. Co. and driven some piles and placed a notice thereon, and for these reasons, we contend, that, leaving out the question of an upland owner being entitled to free access to navigable waters bordering upon his land, Barron in this case has a prior right to the fish-trap location as against Alexander, the appellee."

In view of the record in this case, the foregoing statement of counsel is an absurd and most astounding proposition. It is a desperate attempt of a drowning man to save himself by grasping a straw. What are the facts? The printed record shows that in 1908 the Alaska Packers' Association operated a fish-trap in approximately the same place now occupied by the trap of the appellee; that this trap was washed out by the action of the sea and was never rebuilt; that no trap was located there during the years 1909 and 1910 (Testimony of Alexander, P. R. 667–682, and testimony of Barron, P. R. 195, 196); that in 1910, appellant leased the site and attempted

to purchase the same but the Alaska Packers' Association refused to sell. (See testimony of Jas. T. Barron, P. R. 198, 199, as follows:)

> "Q. (By Mr. WINN.) Now, I will ask you if you had any adjustment or settlement of any claim that the Alaska Packers' Association made to any of the grounds in front of this survey 804? (182.)
>
> "A. Yes; I leased it in 1910. They gave me a lease. That same time I went down to San Francisco and they didn't care about giving me a quitclaim deed for it, because they wasn't quite certain they would abandon all their rights of fishing grounds in this district. So, they said they would lease it to me for a nominal sum for a year and then we would make further adjustment. Later why they concluded they were not going to use their grounds."

The foregoing is the only testimony to be found in the record upon this point, and shows conclusively that the Alaska Packers' Association refused to sell the trap-site to Mr. Barron.

It is true, however, that Mr. V. A. Robertson, in his quitclaim deed to Barron (P. R. 142, 143) attempted to convey the rights of the Alaska Packers' Association to Barron, but as Robertson had no authority to deed property belonging to that company, such recital in the deed is mere surplusage.

If the Act of June 26, 1906, has any bearing upon this case and affords any protection to anyone, and if, as counsel says, the first in time is first in right, then Mr. Alexander, the appellee, is entitled to the

benefit of that statute, and being first in time he has the prior right. The testimony shows that both appellee and appellant had knowledge of this valuable trap-site location for two years while it remained vacant and unoccupied by anyone, and that appellee was the first to take advantage of this knowledge by constructing his trap. "Equity aids the vigilant and not those who slumber on their rights."

There is no provision of law under which anyone can *locate* a trap-site in the waters of Alaska. Three piles driven by Mr. Barron in the waters of Chatham Straits in the year of 1910 cannot be claimed to constitute a fish-trap within the meaning of the Act of June 26, 1906.

The decision of this Honorable Court in

Columbia Canning Co. vs. Hampton, 161 Fed. 60,

the only case on all-fours with the case now under consideration, should, I believe, govern the Court in its decision here.

As to rights of fishing in general in the public waters, and particularly as to the ownership of the uplands controlling fishing rights on the foreshore, see

Pacific Steam Whaling Co. vs. Alaska Packers' Association, 72 Pac. 161.

Respectfully submitted,

Z. R. CHENEY,
Attorney for Appellee.